In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. _____.

LOUIS S. KERR,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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No. _____.

LOUIS S. KERR,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

The petitioner, Louis S. Kerr, asks that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio, made and entered on February 17, 1971 (App. 6. and 7, pp. 49-50) and rehearing denied March 17, 1971 sustaining respondent's motions to dismiss petitioner's appeal. The consequence of the sustaining of these motions was the affirmance of the judgment of the Ohio Court of Appeals affirming the verdicts by the Court of Common Pleas of Cuyahoga County, Ohio.

OPINIONS IN THE COURTS BELOW.

The Supreme Court of Ohio did not write an opinion in this case. Its final orders are found in Appendix 6 and 7, pp. 49-50.

The Court of Appeals for the Eighth Judicial District of Ohio did not write an opinion in this case. The journal entry for the Court of Appeals is contained in Appendix 5, p. 48. The Court of Common Pleas of Cuyahoga County issued no opinion but the journal entries containing the verdicts of the jury and sentences of the Court are reproduced in Appendix 1, 2, 3 and 4, pp. 41-47.

JURISDICTION.

The final judgment of the Supreme Court of Ohio was entered on a denial of Petitioner's motion for a rehearing entered on March 17, 1971. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(3). Petitioner claims that his conviction was acquired in violation of rights, privileges and immunities secured by the Constitution of the United States. On June 18, 1971, the United States Supreme Court granted petitioner an extension of time until August 14, 1971 within which to petition for Writ of Certiorari. This petition to this Court follows.

QUESTION PRESENTED.

Whether petitioner was denied a fair and impartial trial, effective assistance of counsel and due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and the fundamental fairness accorded to every defendant in a criminal trial when he was convicted on eighteen counts of two consolidated indictments. Ten of said counts for the alleged selling or transferring a motor vehicle without delivering the purchaser or transferee thereof a certificate of title and eight of said counts charging larcency by trick, forgery, and issuing checks with the intent to defraud. Petitioner was sentenced to prison for a period of four (4) to forty (40) years on the basis of a record which reveals the following:

1. The trial court refused to give additional instructions upon matters of law when such instructions were requested by the jury.
2. The trial court failed to limit the application of evidence of other alleged criminal conduct of the accused to the purpose of showing a common scheme, plan, system or design.
3. Petitioner was denied his right to confront the witnesses.
4. Two indictments, totaling five separate different offenses, twenty-five counts, and forty-four different verdicts were consolidated without the acquiescence of defense counsel.
5. A juror was excused during the trial without an explanation of record or consent of the parties, or counsel.
6. Evidence regarding alleged conversations with the accused was admitted without the prosecutor laying the proper foundation to establish the corpus delicti.

7. The State was allowed to amend counts of an indictment after both the State and the defense had rested.
8. The State was allowed to cross-examine its own witnesses without laying a proper foundation therefor.
9. The trial court allowed the prosecutor to engage in a course of conduct and questions which were irrelevant, illegal and prejudicial to petitioner's rights.
10. The prosecutor was allowed to refresh witnesses' recollections without just cause and in violation of the evidentiary rules of criminal procedure.
11. Petitioner was systematically excluded from having effective assistance of counsel by the consolidation of the two indictments, totaling five separate different offenses, twenty-five counts, and forty-four different verdicts.
12. Prosecutor's comments appealed to the prejudice of the jury.
13. Prosecution failed to prove venue as to four counts of the consolidated indictments.
14. The charge to the jury by the trial court was improper.
15. Petitioner's motion for a new trial was denied and deprived him of fundamental fairness and due process of law.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution.

AMENDMENT VI:

In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV (quoted in pertinent part):

* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Ohio Constitution.

ARTICLE I, SECTION 10 (quoted in pertinent part):

* * * In any trial, in any court, the party accused shall be allowed to . . . meet the witnesses face to face . . . , and a speedy public trial by an impartial jury. . . .

Ohio Statutes.

Section 1115.23, Ohio Revised Code:

(Pertinent text set forth in Appendix 12, p. 55).

Section 1303.56, Ohio Revised Code:

(Pertinent text set forth in Appendix 13, p. 55).

Section 1303.57, Ohio Revised Code:

(Pertinent text set forth in Appendix 14, p. 57).

Section 1303.58, Ohio Revised Code:
(Pertinent text set forth in Appendix 15, p. 57).

Section 1303.59, Ohio Revised Code:
(Pertinent text set forth in Appendix 16, p. 59).

Section 1303.60, Ohio Revised Code:
(Pertinent text set forth in Appendix 17, p. 60).

Section 1303.61, Ohio Revised Code:
(Pertinent text set forth in Appendix 18, p. 60).

Section 1303.66, Ohio Revised Code:
(Pertinent text set forth in Appendix 19, p. 61).

Section 1303.67, Ohio Revised Code:
(Pertinent text set forth in Appendix 20, p. 62).

Section 2315.06, Ohio Revised Code:
(Pertinent text set forth in Appendix 21, p. 64).

Section 2907.21, Ohio Revised Code:
(Pertinent text set forth in Appendix 22, p. 64).

Section 2913.01, Ohio Revised Code:
(Pertinent text set forth in Appendix 23, p. 65).

Section 2941.04, Ohio Revised Code:
(Pertinent text set forth in Appendix 24, p. 66).

Section 2941.30, Ohio Revised Code:
(Pertinent text set forth in Appendix 25, p. 67).

Section 2945.36, Ohio Revised Code:
(Pertinent text set forth in Appendix 26, p. 68).

Section 2945.59, Ohio Revised Code:
(Pertinent text set forth in Appendix 27, p. 68).

Section 2945.79(B), Ohio Revised Code:
(Pertinent text set forth in Appendix 28, p. 69).

Section 4505.19(F), Ohio Revised Code:
(Pertinent text set forth in Appendix 29, p. 70).

STATEMENT OF THE CASE.

Petitioner was indicted by the Grand Jury of Cuyahoga County, Ohio, on September 23, 1963 on ten (10) counts of violation of Ohio Revised Code, Section 4505.19 (F), selling or transferring a motor vehicle without delivering the purchaser or transferee thereof a certificate of title.

Petitioner was indicted by the Grand Jury of Cuyahoga County, Ohio, on October 22, 1963 on a second indictment containing fifteen (15) counts of various violations of Ohio Revised Code, Sections 2907.21 (Larceny by Trick); 2913.01 (Forgery); 2913.01 (Uttering and publishing a forged instrument); and 1115.23 (Issuing checks with the intent to defraud).

Petitioner was arraigned in Case No. 79072 (on the first indictment) on September 24, 1963, and in Case No. 79231 (on the second indictment) on October 23, 1963; petitioner entered a plea of "Not Guilty" at both arraignments.

On October 13, 1964, petitioner's trial began upon Case No. 79072 and Case No. 79231. At the commencement of trial, the Court ordered the two indictments consisting of twenty-five counts to be consolidated. Consequently, as a direct result of that consolidation of the twenty-five counts, petitioner's trial and the judge's charge was fraught with error pertaining to the law, corpus delicti, hearsay evidence, conversation with the defendant and what to charge and what not to charge in the final analysis.

The initial consolidation of the multiplicity of the various counts of the two indictments brought about a denial of due process of law which was so lethal in its inception that fundamental fairness and due process of law, which is basic to a fair and impartial trial, never had

the opportunity to be accorded to the petitioner throughout the trial.

The specific incidents hereinbefore mentioned are discussed in detail in "Reasons for Granting the Writ," which follows this statement.

On November 19, 1964, the jury returned its verdict of guilty as to all ten counts of the first indictment, Case No. 79072, and guilty as to the second, third, fourth, seventh, eighth, ninth, eleventh, and twelfth counts of the second indictment, Case No. 79231.

A Motion for New Trial was timely filed on November 23, 1964, and was overruled on December 9, 1964.

On December 9, 1964, in Case No. 79072, the petitioner was sentenced to the Ohio State Penitentiary on all ten (10) counts, the first and second count to run consecutively and count three through ten concurrently and concurrently with count number two. The petitioner was released on the same bond pending appeal.

On December 9, 1964, in Case No. 79231, the petitioner was sentenced to the Ohio State Penitentiary on counts three and seven consecutively and counts two, four, eight, nine, eleven, and twelve, concurrently and concurrent with count number seven. The petitioner was released on the same bond pending appeal.

Notice of appeal was timely filed on January 4, 1965.

On January 25, 1965, the petitioner made application for the trial court to allow the transcript to be taxed as cost, based on the petitioner's indigency.

On April 13, 1965, the trial court refused to grant the transcript at State cost.

On April 22, 1965, Notice of Appeal was filed on the Court's refusal to grant said transcript, based on the petitioner's indigence.

On November 24, 1965, the Court of Appeals reversed the trial court and allowed the transcript to be taxed as cost, because of the petitioner's indigency.

The respondent excepted to the Court of Appeals ruling, allowing the transcript to be taxed as cost and filed Leave to Appeal to the Ohio Supreme Court and said leave was allowed on December 22, 1966. On February 16, 1967, the question of allowing the transcript to be taxed as cost based on the petitioner's indigency was argued before the Supreme Court of Ohio.

On May 15, 1967, the Supreme Court of Ohio affirmed the Court of Appeals ruling allowing the transcript to be taxed as cost, based on the petitioner's indigency.

On June 12, 1967, the bill of exceptions was filed with the trial judge. Thereafter, this Appeal followed to the Court of Appeals for the Eighth Judicial District of Ohio.

Thereafter, the petitioner perfected an Appeal to the Court of Appeals, Eighth Judicial District of Ohio, Cuyahoga County, and on the 20th day of July, 1970, the Court of Appeals, filed its Journal, finding no prejudicial error and affirmed the trial court's verdict without opinion in Common Pleas Court, Case No. 79072 and 79231 and Appeals Court No. 27281 and 27282.

Thereafter, the petitioner filed his Notice of Appeal to the Supreme Court of Ohio on August 4, 1970.

On December 14, 1970, the petitioner being out of rule as to filing of memorandum in support of jurisdiction in the Ohio Supreme Court, the respondent filed a motion to dismiss the appeal.

On December 17, 1970, petitioner, filed his motion in opposition to dismiss, acknowledging excusable negligence, moved to retain and leave to file memorandum in support of jurisdiction within thirty (30) days.

On February 17, 1971, the Supreme Court of Ohio sustained the respondent's motion to dismiss the appeal and denied a rehearing on March 17, 1971.

On March 26, 1971, the Supreme Court of Ohio granted a twenty (20) day extension, pending filing of a

petition for Writ of Certiorari and stay of execution in the United States Supreme Court.

The United States Supreme Court denied a stay of execution of the sentence pending the filing of a Writ of Certiorari and the petitioner presented himself before the Judge of the Court of Common Pleas, Cuyahoga County, Ohio, on April 30, 1971, sentence was imposed and petitioner was confined in the Ohio State Penitentiary.

Thereafter, this petition followed.

Petitioner, Louis S. Kerr, was the president of a corporation known as the "Louis S. Kerr Motor Sales, Inc." The corporation dealt in the sale of new Studebaker automobiles and used cars of all makes.

In 1961, one Evan B. Brewster, had agreed to floor plan cars for the Louis S. Kerr Motor Sales, Inc.

In 1963, sales decline had set in as to Studebaker automobiles and the "Louis S. Kerr Motor Sales, Inc." ran into financial difficulties. The support of Evan B. Brewster was withdrawn and every effort was made by him to salvage what finances he could personally, and the company was subsequently thrown into bankruptcy. Following the corporation's bankruptcy, the Cuyahoga County Grand Jury returned the two indictments referred to in the Statement of the Case, said indictments comprising a total of twenty-five (25) various counts, and consisting of five (5) different, separate and distinct offenses, relating to multiple persons and necessitated forty-four (44) possible different verdicts to be returned by the jury.

Under the guise of saving time the Court ordered consolidation of the two (2) indictments, containing twenty-five (25) counts, comprising five (5) separate offenses. Consequently, as a direct result of the multiplicity of counts, the effects of that consolidation repeatedly gave rise to error throughout the course of the trial and the judge's charge, as it pertained to the law,

corpus delicti, hearsay evidence, conversation by defendant, and what to and what not to charge in the final analysis.

The initial consolidation of the multiplicity of the various counts of the two (2) indictments, brought about a denial of due process, which was so lethal in its inception that fundamental fairness which is basic to a fair and impartial trial, never had the opportunity to be accorded to the petitioner throughout the trial.

The specific facts of this case are more easily understood, if they are discussed in relationship with the several Constitutional violations of law assigned hereafter, raised by objection at the time of trial and by assignment of error in the Ohio Court of Appeals. In that manner one can readily determine the devastation which was wrought with the concept of due process of law.

REASONS FOR GRANTING THE WRIT.

I. The Refusal of the Trial Judge to Give Additional Instructions Upon Matters of Law When Requested to Do So by the Jury Constitutes Prejudicial Error by Depriving the Accused of a Fair and Impartial Trial.

In according Due Process of Law to an accused, no rule of law is more fundamental than that provided by Section 2315.06, Ohio Revised Code, which imposes a duty upon the trial judge, upon request by a jury for additional instructions, to give the information sought on matters of law. The Trial Court, charging on five (5) separate offenses and forty-four (44) possible verdicts, refused, at (R. 2512) to provide the jury with additional instructions, after requested to do so, as to the legal definition of intent.

Section 2315.06, Ohio Revised Code, provides in pertinent part:

"After the jurors retire to deliberate, . . . or desire to be further informed of the law of the case, they may request the officer in charge to conduct them to the Court which shall give the information sought upon matters of law."

Section 2315.06 has been interpreted as being mandatory on the trial judge as to questions of law, *State vs. Kennedy,* 72 Ohio App. 462, 52 N.E.2d 873 (1943), and that the failure of the judge to so instruct is, ". . . error prejudicial to defendant's substantial rights." *Cincinnati vs. Epterson,* 20 Ohio St. 2d 59, 47 Ohio Op. 2d 342, 253 N.E.2d 785 (1969), at Syllabus 3.

"The failure by the trial court in a criminal case to answer a question of law relating to a defense presented, which is submitted to the Court by the jury after they had retired to deliberate, is error prejudicial to defendant's substantial rights."

It became quite obvious that the jury did not have an understanding, or they had an erroneous understanding of the definition of intent. The jury after deliberating for quite some time, forwarded the following question to the Court.

(R. 2515):

Monday, November 16, 1964, 3:10 P.M.

"The Court: Mr. Colleran, there has been directed to the court a question. This is correct, sir?

Mr. Colleran: Yes, your Honor.

The Court: Is this correct, Ladies and Gentlemen of the Jury?

Jurors: Yes.

The Court: Now, I am going to read this question for the record: 'In the 7th through the 15th charges of the second group of charges the words "intent to defraud" appear. The Jury would like to have the charge to the Jury in this regard repeated.'

Signed by the foreman of the jury, James P. Colleran.

Gentlemen, is this the question which the court read to you as a question which has been directed to the court?

Mr. Benjamin: Yes, your Honor.

Mr. Smith: Yes, your Honor.

The Court: The court at this time, Ladies and Gentlemen of the jury, indicates to you that you are to recall the charge in its totality and return to your jury room and continue with your deliberations.

You are to recall the charge in its totality and return to the jury room until such time as you have reached a verdict in this case.

(Thereupon the jury withdrew from the courtroom; the following proceedings then continued in the court's chambers, the court and all counsel being present:)

The Court: Just for the record, Gentlemen, this is what you agreed that the court ought to do in this instance?

Mr. Benjamin: Yes.

The Court: Mr. Smith?

Mr. Smith: Correct, your Honor.

The Court: Mr. Benjamin?

Mr. Benjamin: Yes, your Honor.

Mr. O'Brien: Yes, your Honor.

The Court: All right; that's all."

The law as to this question has long ceased to be of controversy. After a case is submitted to the jury, the Court may give additional instructions at the request of the jury. *Liska vs. State,* 115 Ohio St. 283, 152 N.E. 667. The jury may, after final submission of the case, *be advised on matters of law. State vs. Town,* Wright 75.

The procedure must have its inception in the action of the jury only "if they disagree as to the testimony, or desire to be further *informed on the law* of the case."

Hubbuch vs. Springfield, 16 Ohio Op. 174; Appeal dismissed 136 Ohio St. 124.

In *Scott vs. Wix,* 71 Ohio App. 519, 50 N.E.2d 361; a request by the jury for additional instructions imposes upon the trial judge the duty of complying with Section 2315.06, O.R.C., and in the presence of counsel to "give the information sought upon matters of law."

The rights of the defendant in a criminal case must be protected by the Court. *State ex rel. Schroeder vs. Shay,* 3 Ohio N.P.(n.s.) 657, 16 Ohio Dec. 446.

It is inherent in the concept of due process of law, as provided by the Fourteenth Amendment, that the charge of the Court to the jury requires accuracy, clearness, and certainty, *State vs. Collins,* 94 Ohio App. 401, 52 Ohio Op. 97, 115 N.E.2d 844 (1952), and a failure to charge the jury fully undermines the protections afforded an accused by the Fourteenth Amendment.

The respondent cannot justify the Court's refusal to charge. The judge did not fulfill his responsibility of providing the jury with the law. No justification can be raised by the respondent relying on the fact that both counsel agreed that the judge should respond to the jury's question in regards to the law, in the manner which he did. The sole responsibility for providing the law in any case is that of the trial judge. Such responsibility cannot be disregarded merely because both counsel agree that he should not charge. The Court may seek the advice and consultation of both lawyers on how and what to charge but in the final analysis the law is the exclusive province of the judge and the judge has no right to refuse the jury's request for instructions on a matter of law. *The duty of the court is mandatory.* Notwithstanding the agreement of counsel.

The substantive right of the petitioner to have the jury properly understand and interpret the law is so fundamental that it cannot be waived by counsel. Such a waiver would also necessitate the waiver of due process of law, which is untenable.

II. The Failure of the Trial Court to Instruct the Jury to Limit the Application of Evidence of Other Alleged Criminal Conduct of the Accused to the Purpose of Showing the Scheme or Plan of the Accused Attending His Action With Respect to the Crime for Which He Is Being Charged Constitutes Reversible Error and a Denial of a Fair and Impartial Trial.

Section 2945.59, O.R.C., is set forth in its entirety in the Appendix at page 68.

No effort was made by the Trial Court to correlate evidence, which tended to infer a multitude of like and similar acts, to any one of the five separate charges with which the evidence may have been competent. The Court did not instruct the jury as to the limited purpose of such evidence either at the time the evidence was introduced or when the jury was given the general charge by the Court.

Section 2945.59, O.R.C., outlines the limited purpose for which such evidence may be admitted—law which is so self-evident that it suffices to say that the Trial Court should definitely limit the purpose of evidence of the commission of other alleged similar acts to the purpose for which such evidence is admissible and proper. *Lyon vs. State,* 116 Ohio St. 265, 155 N.E. 800 (1925), *State vs. Oldham,* 53 Ohio L. Abs. 277, 84 N.E.2d 773 (App. Div. 1948). The Court could have so instructed the jury either when the evidence was admitted or in the general charge or at both times, *Barnett vs. State,* 104 Ohio St. 298, 135

N.E. 647, 27 A.L.R. 357 (1922), but the Court took neither opportunity.

Such a failure on the part of the Court in not informing the jury as to the limited purpose for which the evidence was admitted has been held to constitute prejudicial error, *State vs. Urick,* 41 Ohio L. Abs. 145, 58 N.E.2d 216 (1944).

In the case of *State vs. Urick, supra,* where such evidence of like and similar nature was introduced without informing the jury of the purpose for which the evidence was admitted, accomplished the following.

1. It was before the jury for all probative purposes for which they might give it application.

2. It tended materially to establish by proof of the unrelated offenses that the defendant was guilty of the offense charged.

3. It tended to draw away the minds of the jurors from the point in issue and to excite prejudice and mislead them which constitutes prejudicial error.

Two flagrant excerpts from the record where such alleged like and similar act evidence was permitted to be introduced without proper limitation were at (R. 2086) where the prosecutor attempted to infer some criminal conduct on behalf of the defendant as a result of a note owed by the defendant,

Cross-examination of Louis S. Kerr (R. 2086):

"Q. Chicago, is that right?

A. I left Chicago and came to Indianapolis, yes.

Q. And can you tell us what was the business about a note with National China and Equipment Company?

Mr. Benjamin: Objection.

The Court: May I have that question? I didn't hear it.

(Question read.)

The Court: Sustained. Lay a foundation for it.

Q. Didn't the National China and Equipment Company co-sign on a note for you and was forced to pay it?

Mr. Benjamin: Objection.

(Discussion off-the-record between the Court and counsel for the respective parties.)

The Court: You may answer. May we have the question, Mrs. McMahan?

(Question read.)

A. It was paid from an accrued commissions which I had at the corporation, yes."

and at (R. 2119) when defendant, upon cross-examination by the prosecutor, was required to testify about previous bankruptcy, divorce and custody of his children.

Cross-examination of Louis S. Kerr (R. 2119):

"Q. Now, at this time, did you tell them all about yourself?

A. That and other times yes, sir.

Q. Well, when you told them all about yourself, will you tell us what you told them?

A. I told them of the Little Rock situation, the bankruptcy that I had, my general background.

Q. Well, tell us what you told them.

A. As testified, it's already been testified here.

Q. Well, tell us again.

Mr. Benjamin: Objection.

The Court: Overruled.

A. I told them that I had, I was in business in Little Rock. I told them that I had a bankruptcy. I told them that I paid the bankruptcy. I told them that I had a divorce and had custody of my children. They had met my present wife and my children.

I told them of my automobile background, of what we were doing at O'Malley-Porach."

At (R. 2120-2121) cross-examination was permitted of the defendant, regards the defendant being tried and convicted at Little Rock, Arkansas, in reference to issuing checks. Said answer was required of the defendant over objections by defendant's counsel, notwithstanding the fact that the:

1. Questions was framed improperly;
2. That the offense was a misdemeanor;
3. That the State never supported the allegation of the alleged conviction;
4. No charge of the like and similar act was given to the jury to advise them, if such testimony was admissible of the expressed limited purposes of such testimony.

Cross-examination of Louis S. Kerr (R. 2120-2121):

"Q. Now, in telling them all about yourself, was that all about yourself?

Mr. Benjamin: Objection.

The Court: Sustained.

Q. Well, didn't you leave something out when you explained about the business back there in Little Rock?

Mr. Benjamin: Objection.

The Court: Yes or No?

A. I don't recall, sir. This was quite some time ago.

Q. Did you tell them about the checks?

A. What checks are you referring to?

Q. Back there in Little Rock.

A. What checks are these, sir?

Q. Well, do you know anything about checks back there?

A. In reference to what, sir?

Q. Well, was there something about six months, sir?

Mr. Benjamin: Objection.

The Court: Sustained.

Q. Were you tried and convicted back in Little Rock of issuing checks.

Mr. Benjamin: Objection.

The Court: Yes, or no, only as to convicted.

A. Yes.

Q. You didn't tell them about that, did you?

A. I certainly did, sir.

Q. You told them about what?

A. Yes, sir.

Q. All right, sir.

And they still—and they were still willing to back you to the hilt in purchasing any business you wanted to buy?

A. Absolutely, sir. It was explained what that was. It was a misdemeanor charge.

Q. I didn't ask you about the charge.

Mr. Benjamin: Objection.

The Court: Approach the bench, please."

We, however, find the Court attempting to correct said prejudicial error after one hundred forty-seven (147) additional pages of testimony has come into the record by the following excerpt, an admonition to the jury at (R. 2267-2268).

(R. 2267-2268):

"Thereupon Louis S. Kerr resumed the witness stand.

The Court: Before we begin, Ladies and Gentlemen of the jury, during the early part of the cross-examination conducted by Mr. Smith of Mr. Kerr, you will recall directed to Mr. Kerr was a question about a trial and a conviction in Arkansas.

The Court at this time instructs you, the jury, that you are to disregard this question and the answer. The Court strikes from the record that phase

of the examination in its totality. You are to disregard that phase of the examination, the question and the answer.

The Court at this time strikes from the record that phase of the examination.

Thank you, Ladies and Gentlemen of the jury. Proceed."

To save this Court time, and because the records are so voluminous, other such incidents have been omitted in context, but they may be found at (R. 234, 326, 341, 359, 374-375, 385-386, 390, 417-425, 430-433, 647, 649-651, 678-679, 753-755, 764-765, 854, 895-896, 916, 921, 957, and 1118-1119).

Although many of the bits of testimony cited herein claiming that a charge by the Court as to like and similar acts should have been given. If taken separately, would not support our claim; when they are taken in toto (twenty-two violations in all) the jury should have been instructed as to their limited applicability. The failure to do so resulted in grave prejudicial error and denied petitioner his right to a fair and impartial trial—the purpose of the Due Process Clause of the Fourteenth Amendment. The very concept of fundamental fairness was completely shattered.

III. A Denial of the Right of the Accused to Confront the Witnesses Is Violative of Article I, Section 10 of the Ohio Constitution and the Sixth and Fourteenth Amendments to the United States Constitution and Such Denial Constitutes Prejudicial Error and a Denial of Due Process of Law.

The Sixth Amendment to the United States Constitution, and the Fourteenth Amendment which applies the protections and safeguards of the Sixth Amendment to the States, via the due process clause, provide that every person shall be allowed to confront the witnesses against him. Article I, Section 10 of the Ohio Constitution similarly provides that, "On any trial in any Court, the party accused shall be allowed to meet the witnesses face to face."

In two of the various counts of the consolidated indictment, the defendant was charged with failing to deliver an auto title to one Susan Case and forging and uttering a forged instrument, to wit: Signature on Power of Attorney, Herman Adelstein.

Although there was no title in the name of Susan Case, she was called to testify, as the complainant, for herself and for her husband, in whose name the title was made. The husband, as the owner-complainant, never testified even though his name and testimony were essential in order to establish the offense charged in the indictment.

Although petitioner was charged with forging and uttering Herman Adelstein's signature, Dr. Adelstein was never called as a witness to testify and establish the elements of the indictment or refute the evidence that he had granted petitioner a power of attorney.

To constitute a compliance with the Constitutional right of an accused to meet the witnesses against him face

to face, the witnesses testifying in support of the accusation against that accuser must be seen and heard by the accused. Such was not the case at bar. Denial of petitioner's right to due process of law as guaranteed by the Fourteenth Amendment resulted from such inability to confront these witnesses.

By allowing Susan Case to testify instead of her husband, and by not requiring Dr. Adelstein to testify, the Trial Court permitted the jury to speculate and assume the testimony of the missing witnesses. The Court should never permit a jury to speculate. The jury was also left with speculation testimony and conclusions given by the witnesses of the ultimate issue to be decided by the jury in numerous other points in the trial, and no witnesses were produced by the State to establish the facts testified about. Such incidents, too voluminous to report in context, can be found at (R. 856, 119, 123, 127, 188, 251, 258, 1087, and 1089).

In the proper administration of justice, the Court should give a person accused of a crime a reasonable opportunity to obtain the benefit of the Fourteenth Amendment, Ohio Constitution, and Ohio case law (*Farrington vs. State*, 10 Ohio 354 (1841), *Weisenberg vs. State*, 12 Ohio App. 272, 31 Ohio Ct. App. 350 (1920)) of the right to meet the witnesses against him face to face. This the Court did not do.

IV. The Consolidation of Two Indictments Totaling Five Separate Different Offenses, Twenty-Five Counts and Forty-Four Different Verdicts Denies the Accused the Right to a Fair and Impartial Trial and Is a Denial of Due Process of Law as Guaranteed Under the Ohio and United States Constitutions, and the Failure of the Trial Court to Secure a Stipulation of Record Showing Defense's Acquiescence in Such Consolidation Is Prejudicial Error.

The most precipitous error of the entire trial is the apparent effort to save time by consolidating two indictments totaling twenty-five counts, comprising five different offenses and resulting in forty-four different verdicts to be returned by the jury. The effects of this consolidation repeatedly gave rise to error throughout the course of the trial and the Judge's charge, as it pertains to the law, corpus delicti, hearsay evidence, conversation by the defendant, and as to what and what not to charge in the final analysis.

There is no indication in the record of any acquiescence by defense counsel and that is all that the reviewing court may base its decision on. The reviewing court is not allowed to indulge in guess or presumption as to what transpired in a lower court but must base its decision on the agreed statement of facts of the case, *State vs. Barmann*, 41 Ohio L. Abs. 433, 58 N.E.2d 691 (1943). Therefore, in the absence of any evidence in the record, this Court must hold that there was no stipulation by petitioner to consolidate the charges.

It logically follows that if there was no such stipulation, then the fundamental question becomes whether or not the trial Judge committed error by consolidating said indictments over petitioner's objection (R. 4):

Under Section 2941.04, Ohio Revised Code states that before several different offenses can be tried together the following things must concur:

1. They must be connected together in their commission;
2. They must be different statements of the same offense; and
3. Two or more offenses must be of the same class of offenses.

In considering the offenses with which petitioner was charged (unlawfully selling a motor vehicle without delivering a certificate of title, forgery, uttering and publishing a forged instrument, larceny by trick, and uttering and delivering a check without credit and with intent to defraud), they are not connected in their alleged commission, and they are not the same class of crime. A joinder in an indictment that fails to fall within the areas outlined by Section 2941.04, Ohio Revised Code, is an improper joinder. *State vs. Atkinson,* 4 Ohio St. 2d 19, 211 N.E.2d 665 (1965).

Section 2941.04, Ohio Revised Code, states further that the Court, in the interest of justice, may order different offenses in the indictments tried separately. Counsel maintains that it was not in the interest of justice nor was it fundamentally fair to consolidate the two indictments in this case comprising twenty-five counts and five separate distinct charges resulting in forty-four different verdicts.

A trial judge is under a heavy responsibility to see that a case is properly tried. *George vs. U. S.,* 266 F.2d 343 (1958), and if the trial court fails to observe a mode of procedure ordered by law for the protection of the accused, there is an abridgment of a substantial right, and the error is reversible, *Zimmerman vs. State,* 42 Ohio App. 407, 182 N.E. 354 (1932).

It is among the most fundamental of legal axioms that a defendant must not only be guilty of the offense with which he is charged and convicted, but he must be tried and convicted according to proper legal procedures and standards. *United States vs. England,* 347 F.2d 425 (1965).

In the case at bar the error of the Court in consolidating the two indictments, and the prejudice sustained by petitioner in being denied a fair and impartial trial becomes even more evident when we look at the record and see that time after time the Court permitted the introduction of conversation with the defendant without the corpus delicti of the five separate particular crimes presented by the consolidation having been first established. Due Process of Law was denied petitioner in this trial as a direct result of such consolidation.

V. The Arbitrary Excusing of a Juror During the Progress of a Criminal Trial Without an Explanation of Record or Consent of the Parties and Counsel, Constitutes Reversible Error and a Denial of a Fair and Impartial Trial.

Section 2945.36, Ohio Revised Code, sets forth under what circumstances a jury or juror may be discharged, and includes the phrase,

> ". . . The reason for such discharge shall be entered on the journal."

At R. 466 a juror was arbitrarily excused and replaced by another juror. No mention or indication was made for the record as to the reason for that juror's dismissal, and strictly construing the aforementioned statute the only conclusion that can be reached is that the Trial Court committed error in contravention of the statute.

Such prejudicial error in arbitrarily dismissing a juror without indicating a reason therefor goes to the very roots of a fair and impartial trial. Having been denied this, petitioner was not accorded the protection of the Fourteenth Amendment Due Process clause.

VI. Alleged Conversations With the Accused Were Indiscriminately Admitted Into Evidence Without Prior Evidence Tending to Establish the Corpus Delicti—in Derogation With the Law of the State of Ohio—Thus Denying Petitioner His Right to a Fair and Impartial Trial.

The law in Ohio is that there must be some evidence outside of a confession tending to establish the corpus delicti, or body of the offense, before such confession is admissible. *State of Ohio vs. Miranda,* 94 Ohio St. 364 (1916). The holding in *Miranda* goes on to state that the corpus delicti consists of two elements only—the act and the criminal agency of the act—and it does not include any element of implication of the accused in the commission of the act.

It is a well known principle of law that *the corpus delicti cannot be proved by the extrajudicial confession of the accused alone.* In *State of Ohio vs. Charles Morris,* 7 Ohio Dec. 84 (1896) the Syllabus reads:

> Proof of the *corpus delicti* cannot be established by the confession of the accused alone, but a confession, made by a defendant when of sound mind and capable of understanding the nature, extent and fact of such confession when corroborated in material and important parts with other evidence, either positive or circumstantial, constitutes the proof required by law of the body of the crime.

Furthermore, the corpus delicti must be proved by clear and unequivocal proof. *McGuire vs. State,* 3 O.C.C. 551, 2 Ohio C. Dec. 318 (1889).

When the proof of the commission of the crime is direct and positive, any extrajudicial confessions made by the accused, if otherwise competent, are admissible to establish the accused's connection with the crime. *State vs. Knapp,* 70 Ohio St. 381 (1904). Although it would be difficult for any court to declare a hard and fast rule as to the quantum of evidence required to supplement a confession, it must at least be such as to convince the jury, or court if not tried before a jury, when taken with all other evidence, as to the guilt of the accused beyond a reasonable doubt. A verdict of guilty by a jury that has not weighed all the evidence is a lack of fundamental fairness and results in a denial of a fair and impartial trial.

Inasmuch as the consolidated indictments gave rise to five separate offenses, it logically follows that five separate corpus delicti had to be established. No procedural observance was maintained by the Court in order to determine if the corpus delicti had been established before admitting various conversations with the defendant, nor was any concern given to the proposition of establishing the five respective corpus delicti and relating them to the particular offense and further observing that the particular conversation being admitted was related to that particular offense with which the corpus delicti had been established. The results of this conduct were a multiplicity of errors which were grossly prejudicial to petitioner and which were violative of a fair and impartial trial which is the very core of Due Process of Law as protected by the Fourteenth Amendment.

The conversations, or excerpts therefrom are too voluminous to quote contextually, but for the convenience of this Court they are located at (R. 106, 113-114, 178-179, 203-205, 233-239, 290, 316-317, 319, 338, 355-356, 357-359, 362-363, 369, 436-438, 445, 447-448, 455, 460, 462-465, 467-468, 727-729, and 752-755).

VII. Permitting the State to Amend Counts of an Indictment After Both the State and Defense Have Rested Constitutes an Abuse of Discretion and a Denial of Due Process of Law.

Section 2941.30, Ohio Revised Code, gives the trial judge broad powers regarding the amendment of the indictment. There appears to be something basically unfair in permitting the amendment of an indictment after both sides have rested their case. It basically denied petitioner the right to cross-examination and prevented him from having effective Due Process of Law as guaranteed by the Fourteenth Amendment.

VIII. The State Is Not Permitted to Cross-Examine Its Own Witnesses in the Absence of Laying a Foundation Therefor, and the Raising of Prejudicial Inferences by the State In Cross-Examining Its Own Witnesses Without Substantiating Such Prejudicial Inferences by Direct Testimony Is Violative of a Fair and Impartial Trial.

A party is generally not permitted to cross-examine its own witness without laying a proper foundation for that cross-examination, *State v. Stiles*, 88 Ohio L. Abs. 412, 21 Ohio Op. 2d 240, 179 N.E.2d 76 (App. Div. 1962); however, by discretion of the Court, a party may cross-examine its own witness if there are grounds to show that

the examining party was suprised as to a discrepancy between testimony given at trial and statements allegedly made by the witness to the examiner before trial or that the witness turned out to be hostile.

Where counsel, taken by surprise, is allowed to cross-examine his own witness and a statement is made to that witness in the form of a declaration of what the witness said to him, such statement is objectionable until it is put in the interrogatory form, *City Ice and Fuel Co. vs. Center*, 54 Ohio App. 116, 7 Ohio Op. 434, 22 Ohio L. Abs. 189, 6 N.E.2d 580 (1936). Furthermore, such witness may be interrogated concerning his prior sworn statements only for the purpose of refreshing his recollection, not for the purpose of offering substantive evidence against the accused, *State vs. Duffy*, 134 Ohio St. 16, 11 Ohio Op. 383, 15 N.E.2d 535 (1938), nor for the purpose of discrediting the witness.

The cross-examination of one of the State's witnesses in the case at bar at (R. 332-338) was conducted in the form of declarations rather than interrogatories, and it was used as substantive evidence rather than for the purpose of refreshing the witness' recollection. Furthermore, there was not even a showing by the State as a matter of evidentiary facts that the witness took the prosecutor by surprise; the State merely claimed surprise. Therefore, the State never laid the proper foundation so as to allow it to cross-examine its own witness (R. 332).

For the convenience of the Court, at Appendix 33, p. 73 through p. 77, are excerpts from the record dealing with those instances where the respondent cross-examined their own witness.

The declaratory examination was sufficient error in of itself to cause prejudice, in addition at (R. 335) we find a most inflammatory declaration by the prosecutor which reads as follows:

> "Q. Did you say this: 'On October 2nd, 1963, I was contacted by investigator Hill and ordered to report to the Bureau of Motor Vehicles office and upon arriving I was shown an analysis report by Joseph Tholl, handwriting examiner of questionable documents.'"

The jury has no other recourse but to infer from said declaration that there was some evidence by a handwriting expert which pointed to the defendant's guilt in the case. This error was never corrected. Joseph Tholl was never called to testify as to any such evidence. No instructions were ever given to the jury. The efforts of the Prosecutor were to use such testimony as substantive evidence so as to deprive petitioner of a fair and impartial trial, fundamental fairness and due process of law as guaranteed by the Fourteenth Amendment.

(R. 337). The witness acknowledged having conversation with a Mr. Hill and Miss Abrams. He did not recall stating, *"The following statement is regarding forgery, etc."* Such question was purely an effort to use the statement as substantive evidence. The questions were not designed to refresh the witness' memory. Vigorous prosecution is to be expected and is desirable by all law-abiding citizens, but it must be done in accordance with rules of procedure and fairness that will insure even the guilty due process of law. In the particular case before the Court, Mr. Hill and Miss Abrams were not called as rebuttal witnesses to insure and support the fact that the witness made the statement and made the statement as regarding forgery. The above error in the trial of this matter contributed to the multitude of other errors in denying this petitioner due process of law.

IX. Petitioner Was Denied a Fair and Impartial Trial and Due Process of Law by the Trial Court's Permitting the Prosecutor to Engage in a Course of Conduct and Questions That Were Irrelevant, Illegal and Prejudicial to the Petitioner's Rights.

The scope and intent of cross-examination are solely matters of trial administration, and it is the court's duty to keep such cross-examination within reasonable bounds and to interfere, even without objection first being made, if the cross-examination is taking such a wide range that its tendency is to cause an unfair trial and a miscarriage of justice. *Brink vs. U. S.*, 60 F.2d 231 (1932), *Sabo vs. State*, 119 Ohio St. 231, 163 N.E. 2d (1928). The failure of a trial judge to prevent improper and prejudicial cross-examination constitutes prejudicial error. *Plas vs. Holmes Construction Co.*, 157 Ohio St. 95, 42 Ohio Op. 86, 104 N.E.2d 689 (1952).

As a general rule, counsel may not ask a witness a question on cross-examination which assumes the existence of a material fact concerning which there has been no evidence except his own question. *W. M. Southern Realty Company vs. Schmidt*, 3 Ohio App. 70, 19 (n. s.) 488 (1914). *Von Quiram vs. Cleveland*, 8 Ohio L. Abs. 585 (App. Div. 1930).

The prosecutor assumed facts not in evidence by these declaratory statements:

(R. 370) "Mr. Kerr showed you that Power of Attorney?" (Assuming the existence of the Power of Attorney without evidence.)

(R. 377) "Tell us who, if anyone, had you sign the name of Dr. Adelstein?" (Causing the jury to assume that petitioner or someone had instructed the witness to sign Dr. Adelstein's name.)

(R. 450-451) "How did you come to have a lien of Exhibit Number 11?" (Assuming that there was a lien on that car without evidence.)

(R. 764) "Now, the first time that you received checks . . ." (Intimating that the witness received checks more than once, without evidence.)

Other examples may be found in the record of the prosecutor's intentional or unintentional irrelevant and improper questions which inflamed the passions and prejudices of the jury (R. 1042, 1046 and 1128).

This type of questioning was not for the probative value of uncovering the truth; rather it had the effect of inflaming and prejudicing the jury, and of assuming facts not in evidence. Surely, such questioning constituted grave prejudicial error and deprived petitioner of a fair and impartial trial as guaranteed by the Due Process Clause of the Fourteenth Amendment.

X. The Procedure Employed by the Prosecutor of Refreshing the Witnesses' Recollection Was, on a Number of Occasions, a Clear Violation of Criminal Procedural Requirements Without Any Just Cause and Constituted a Deprivation of Petitioner's Right to a Fair and Impartial Trial and Due Process of Law.

The Trial Court blatantly abused the rules of criminal procedure in permitting the prosecutor to violate every fundamental concept of refreshing a witness' memory.

A witness' recollection may be refreshed by so directing his attention to a former conversation or declaration as to cause promptly to correct his testimony or explain the apparent inconsistency. *Hurley vs. State,* 46 Ohio St. 320, 21 N.E. 645 (1888); *Van Zandt vs. State,* 13 O.C.C.

(n.s.) 526, 34 O.C.C 424 (1911). There are two classes of cases in which writing or memoranda (see *Moots vs. State,* 21 Ohio St. 653 (1871)) may be used by a witness to refresh his recollection.

The first class of cases allows the memorandum only to refresh his memory, but the witness must be able to testify without referring to the memorandum. *Lovell vs. Wentworth,* 39 Ohio St. 614 (1884), that is, there must be actual recollection or his testimony is not in fact his own recollection or knowledge. *Bierbaum vs. State,* 5 Ohio L. Abs. 483 (App. Div. 1927).

The second class of cases allow a witness who has no recollection of the facts mentioned in a book or other writing, which contain entries made by him in the regular course of his employment, to refresh his memory if he remembers that at the time he made the entries he knew the facts were correctly stated. *Pennsylvania Company vs. Trainer,* 12 Cir. Ct. R. 66, 5 Ohio C. Dec. 519 (1896). Furthermore, it is the law in Ohio that where the original memorandum is used, it must appear that the person preparing it made it at a time when he had a distinct recollection of the facts and before the filing of the suit; therefore, if the original memorandum is available, but a copy of it, made after the suit was filed, is produced, such copy may not be used to refresh the witness' recollection. *Lovell vs. Wentworth,* 39 Ohio St. 614 (1884).

None of the procedural rules that are applicable when a witness has a lapse of memory were followed in the case at bar, nor were any of the safeguards as applying to the trustworthiness of such memoranda followed in petitioner's trial. There was a total lack of foundation to permit the testimony appearing at (R. 442) and (R. 719).

In view of these violations of petitioner's rights to Due Process of Law as secured by the Fourteenth Amendment, the State cannot claim that petitioner had a fair and impartial trial.

XI. The Consolidation of Two Indictments, Totaling Five Separate Different Offenses, Twenty-Five Counts, and Forty-Four Different Verdicts, Created a Circumstance Which Resulted In Systematically Excluding Petitioner from Having the Effective Assistance of Counsel and Violated the Concept of Fundamental Fairness and Prevented Defendant from Having a Fair and Impartial Trial.

The consolidation of the two indictments created a circumstance that was impossible for a superhuman being to be totally knowledgeable, keep separate, distinct, and effectively represent petitioner as to the resulting flow of law precipitated by the consolidation of two indictments, totaling five separate offenses, twenty-five counts, and forty-four verdicts. No one attorney has the mental ability or complete command of the law to effectively represent a defendant on the multiplicity of counts and charges confronting petitioner as consolidated at the last minute.

After the consolidation, defense counsel found himself in the position of having to take the stand (R. 688), and on the stand he was questioned and interrogated on testimony that was highly prejudicial. Such examples of such prejudicial testimony are: Alleged fraudulent manipulations of petitioner (R. 916); alleged hearsay threats to do physical harm to one of petitioner's employees (R. 949); petitioner being called a liar (R. 953); non-sufficient funds and arrest action—testimony and exhibits (R. 957); testimony regarding internal revenue (R. 984); testimony and exhibits—bank memo, regarding insuffi-

cient or non-sufficient funds (R. 1007); bank notice of protest (R. 1020); bank certificates of protest (R. 1021); and conversation with the prosecutor in efforts of settlement (R. 1023).

Defense counsel was forced into an uncompromising position by the consolidation of the two indictments and could not render effective assistance of counsel. This constituted a deprivation of petitioner's rights under the Sixth Amendment as applied to the States by the Due Process Clause of the Fourteenth Amendment. Such lack of effective counsel, being so violative of the Sixth and Fourteenth Amendments systematically deprived petitioner of his right to a fair and impartial trial.

XII. The Comments and Final Argument of the Prosecuting Attorney Appealed to the Prejudice of the Jury and Thus Denied Petitioner a Fair and Impartial Trial.

The prosecuting attorney may not argue upon the demand of public opinion that the jury shall at all hazards convict persons accused of particular classes of crimes, *Hayes vs. State,* 14 O.C.C.(n.s.) 497, 35 O.C.C. 57, affd. 83 Ohio St 490, 94 N.E. 1107 (1910), nor may he appeal to the prejudice, rather than the conscience of the jury, *Deutsch vs. State,* 46 Ohio App. 223, 13 Ohio L. Abs. 456, 188 N.E. 399 (1932). The inflammatory and prejudicial remarks of the prosecutor, leading to a biased and prejudicial verdict by the jury, constituted prejudicial error. *Gawn vs. State,* 13 O.C.C. 116, 7 Ohio C. Dec. 19 (1896). Examples of such prejudicial comments appear at (R. 2285-2287, 2290-2293, 2299, 2305-2311, 2313, 2317, 2319, 2321, 2324-2326, 2416-2417, 2419-2420, 2428-2429, 2433-2436, 2440, 2442-2444, and 2446-2447).

Section 2945.79(B), Ohio Revised Code, states that misconduct of the prosecuting attorney is ground for a

new trial if it materially affects the substantial rights of the accused, and such misconduct was exemplified by the prosecutor's remarks, appealing to the jury's prejudices, by calling petitioner a con-man (R. 2442-2447) even over the sustained objection of defense counsel (R. 2442).

It has been held that failure of the Court, sua sponte, to interpose where counsel has abused the right of argument to the prejudice of the defendant, is grounds for a new trial, *Scott vs. State*, 107 Ohio St. 475, 141 N.E. 19 (1923), approved and followed in *State vs. DeNicola*, 163 Ohio St. 140, 56 Ohio Ops. 185, 126 N.E.2d 62 (1955).

Threat or menace has no place in the repertoire of a prosecutor who, being a semi-judicial officer of the Court, has a duty to see that the defendant gets a fair trial. The evidence may not be distorted, *Mason vs. State*, 5 O.C.C. (n.s.) 113, 26 O.C.C. 535 (1904), but must be confined to that evidence adduced at trial or limited by the Court, *Thurman vs. State*, 4 O.C.C. 141, 2 Ohio C. Dec. 466 (1889).

Argument not based on evidence is ground for reversal, *Howell vs. State*, 102 Ohio St. 411, 131 N.E. 706 (1921), and when arguments are made to incite the jury to convict to meet a public demand or some nebulous juridical conscience are inimical to the basic rights of petitioner since they deny him a fair and impartial trial to which he is entitled under the law. *State vs. Cloud*, 112 Ohio App. 208, 14 Ohio Op. 2d 132, 84 Ohio L. Abs. 491, 168 N.E.2d 761 (1960).

The prosecutor's comments were so prejudicial and inflammatory that even the Courts charge to disregard them was insufficient to correct the wrong that had been created, *Moore vs. State*, 18 O.C.C.(n.s.) 482, 34 O.C.C. 487 (1910), and the ultimate result was violative of petitioner's right to Due Process of Law as guaranteed by the Fourteenth Amendment.

XIII. The Denial of the Trial Court of Petitioner's Motion for a Directed Verdict, Made On the Ground That the Prosecution Had Failed to Prove Venue as to Each Count, Was Prejudicial Error and a Denial of a Fair and Impartial Trial.

Venue must be established by evidence that satisfied the minds of the triers of the facts beyond a reasonable doubt, *State vs. Domer*, 1 Ohio App. 2d 155, 30 Ohio Op. 2d 193, 204 N.E.2d 69 (1964), and a conviction may not be had where the proof fails to show that the crime alleged in the indictment occurred in the county where the indictment was returned. *State vs. Nevius*, 147 Ohio St. 263, 34 Ohio Op. 210, 71 N.E.2d 258 (1947), Cert. Den. 331 U.S. 839, 91 L. Ed. 1851, 67 S. Ct. 1521; *State vs. Schroyer*, 66 Ohio App. 30, 19 Ohio Op. 290, 32 Ohio L. Abs. 676, 31 N.E.2d 469 (1940).

The prosecution at no time established venue as to four counts of the consolidated indictments—failing to deliver a certificate of title to three persons, Sam Dituri, Rhetta Figueroa, Andrew Ryba, and uttering a check in the sum of Three Hundred Sixty-Two Dollars and Fifty Cents ($362.50) to Acme Auto Radiator Company. Although this failure to establish venue is not in and of itself fatal to the prosecution's case, that failure coupled with the other multiple errors that persisted during the trial reinforces the proposition that petitioner did not receive a fair and impartial trial as secured by the Due Process Clause of the Fourteenth Amendment.

XIV. In the Trial of a Criminal Case an Accused Is Entitled to a Charge of Law That Is Relevant to All Issues of Fact, and an Omission of Law Governing the Issues or the Incorrect Stating of the Law That Results in Prejudice to the Accused Denies That Accused His Right to a Fair and Impartial Trial.

Nowhere in the record did the State present any evidence that petitioner was a corporate officer, but the Court charged (R. 2472-2473) the jury as to the criminal liability or corporate officers.

In *State vs. Healy,* 58 Ohio L. Abs. 33, 95 N.E.2d 244 (1950), it is said that, unless it is averred in the indictment or Bill of Particulars and established by proof beyond a reasonable doubt that the accused had no intention of performing the promises at the time they were made, there can be no successful prosecution under Section 2907.21, Ohio Revised Code, Larceny by Trick. Nevertheless, the Court charged the jury (R. 2473-2478) on this statute in the absence of any averments to that effect in the indictments. The counts pertaining to larceny by trick should have been directed out by the Court as a matter of law because they did not state sufficient facts to constitute a charge against the defendant.

The failure of the Trial Court to instruct the jury on what constitutes a Power of Attorney or any law relative thereto, in light of the facts that at numerous times during the trial there was testimony regarding a Power of Attorney and the law governing same, and that the prosecutor told the jury in his summation that the Court would instruct them as to what a Power of Attorney was (R. 2310). This failure of the trial court to so instruct left the jury with only that erroneous law supplied by the prosecutor.

The Court undertook to define the elements of intent for the jury (R. 2480-2481), but thereafter, when it became necessary for the Court to charge on intent as it pertained to that element in other counts of the indictment the Court did not so charge, but rather merely admonished the jury to remember the previous charge (R. 2483).

The Judge's charge on the consolidated indictments comprising sixty-four pages (R. 2447-2512), and the fact that the jury sat for five and one half weeks, listening to testimony, combined to deprive petitioner of a fair and impartial trial by creating such a complex and enigmatic situation for the jury that a true verdict, based on all the evidence and law, could not be reached. In the interest of a fair and impartial trial, the Court should have charged on each element of the consolidated indictments in clear and concise language rather than delegate to the jury the task of recalling a particular element as previously defined.

The Trial Court also neglected to charge the jury as to the law of commercial paper, especially as it pertained to Sections 1303.56, 1303.57, 1303.58, 1303.59, 1303.60, 1303.61, 1303.66, and 1303.67, Ohio Revised Code, all of which were referred to indirectly in testimony as they applied to issuing checks with intent to defraud, without sufficient funds and protested checks. No consideration was given to the admissibility of the above mentioned references at the time they were referred to, nor did the Court seek to aid the jury in their deliberation by charging them on the relevant Ohio Law.

The failure of the Trial Court to charge all of the law to the facts of the case as the Court found them to be constituted a denial of Due Process of Law as guaranteed by the Fourteenth Amendment.

XV. The Trial of a Criminal Case That Does Not Afford the Defendant Fundamental Fairness Is a Denial of Due Process of Law, and the Court's Failure to Grant Petitioner's Motion for a New Trial is Such a Denial.

On December 9, 1964, petitioner's motion for a new trial was overruled. Extensive discussion of same need not be had. The assigned errors previously discussed are hereby incorporated by reference as if fully set forth and adopted and made a part of this assignment of error. Again, assuming the errors existed as previously outlined in this Petition, there can be no question that it was an abuse of discretion for the Trial Court to overrule petitioner's motion for a new trial, and that overruling constituted a denial of petitioner's rights as secured by the Due Process Clause of the Fourteenth Amendment.

CONCLUSION.

The reasons for granting the Writ, as outlined herein, touch the very heart of fundamental fairness and due process of law. We believe sincerely that petitioner was denied a fair and impartial trial, and that each reason previously stated constitutes a serious breach of Constitutional safeguards. Somewhere, some place in our complicated system of justice, some one must consider the injustices that were perpetrated in this case. For these reasons this Court is urged to vindicate petitioner's right to due process of Law, and to grant certiorari.

Respectfully submitted,

REUBEN M. PAYNE,
Attorney for Petitioner.

SINDELL, SINDELL, BOURNE, MARKUS,
STERN & SPERO,
Of Counsel.

APPENDIX

APPENDIX 1.

JUDGMENT ENTRY OF COURT OF COMMON PLEAS, CASE NO. 79072.

(November 16, 1964.)

No. 79072.

IN THE COURT OF COMMON PLEAS

STATE OF OHIO, CUYAHOGA COUNTY, SS.

STATE OF OHIO,

Plaintiff,

vs.

LOUIS S. KERR,

Defendant.

INDICTMENT Violation R.C. 4505.19 F, with counts (10 counts).

JOURNAL ENTRY.

This day again came the prosecuting attorney on behalf of the State, and defendant Louis S. Kerr was brought into court; his counsel coming; also came the jury, duly impaneled and sworn, and the trial proceeded.

And the said jury having heard all the testimony adduced, the arguments of counsel, and the charge of the court, retired to their room in charge of the bailiff for deliberation. And now come the jury conducted into court by the bailiff, and return the following verdict in writing, to-wit: "We, the jury in this case, being duly impaneled and sworn, do find defendant Louis S. Kerr guilty of unlawful sale of 1962 Chevrolet Automobile to Chester Basnett, in violation of R.C. 4505.19-F, as charged in the first count of the indictment; and we find defend-

ant Louis S. Kerr guilty of unlawful sale of 1961 Ford Falcon to Andrew Ryba, R.C. 4505.19-F, as charged in the second count of the indictment; and we find defendant Louis S. Kerr guilty of unlawful sale of 1963 Studebaker Lark Automobile to Susan Cass, R.C. 4505.19-F, as charged in the third count of the indictment; and we find defendant Louis S. Kerr guilty of unlawful sale of 1963 Studebaker Lark Automobile to Anna Vogel, R.C. 4505.19-F, as charged in the fourth count of the indictment; and we find defendant Louis S. Kerr guilty of unlawful sale of 1961 Chrysler Imperial Automobile to Sam Dituri, R.C. 4505.19-F, as charged in the fifth count of the indictment; and we find defendant Louis S. Kerr guilty of unlawful sale of 1963 Lark Automobile to Charles Sefcovic, R.C. 4505.19-F, as charged in the sixth count of the indictment; and we find defendant Louis S. Kerr guilty of unlawful sale of Studebaker Lark Wagoneer, to Jay Williams, R.C. 4505.19-F, as charged in the seventh count of the indictment; and we find defendant Louis S. Kerr guilty of unlawful sale of 1962 Studebaker Lark Automobile to Marcia Nease, R.C. 4505.19-F, as charged in the eighth count of the indictment; and we find defendant Louis S. Kerr guilty of unlawful sale of Studebaker Wagoneer to Rita Figueroa, R.C. 4505.19-F, as charged in the ninth count of the indictment; and we find defendant Louis S. Kerr guilty of unlawful sale of Studebaker Hawk Automobile to Roy L. Bolton, in violation of R.C. 4505.19-F, as charged in the tenth count of the indictment."

Thereupon, the court passed this case for sentence, and defendant is released on same bond pending hearing on motion for new trial.

JOHN M. MANOS,
Judge.

APPENDIX 2.

JUDGMENT ENTRY OF COURT OF COMMON PLEAS, CASE NO. 79231.

(November 16, 1964.)

No. 79231.

IN THE COURT OF COMMON PLEAS

STATE OF OHIO, CUYAHOGA COUNTY, SS.

STATE OF OHIO,

Plaintiff,

vs.

LOUIS S. KERR,

Defendant.

INDICTMENT Larceny by Trick with counts (15 counts).

JOURNAL ENTRY.

This day again came the prosecuting attorney on behalf of the State, and defendant Louis S. Kerr was brought into court; his counsel coming; also came the jury, duly impaneled and sworn, and the trial proceeded.

And the said jury having heard all the testimony adduced, the arguments of counsel, and the charge of the court, retired to their room, in charge of the bailiff, for deliberation. And now come the jury, conducted into court by the bailiff, and return the following verdict in writing, to-wit: "We, the jury in this case, being duly impaneled and sworn, do find defendant Louis S. Kerr guilty of larceny by trick, R.C. 2907.21, as charged in the second count of the indictment, and we find the value of property unlawfully obtained to be $1737.00; and we find defendant Louis S. Kerr guilty of forgery of Power of At-

torney from Herman Adalstein, R.C. 2913.01, as charged in the third count of the indictment; and we find defendant Louis S. Kerr guilty of uttering and publishing Power of Attorney from Herman Adalstein, R.C. 2913.01, as charged in the fourth count of the indictment; and we find defendant Louis S. Kerr guilty of uttering check to Julio Sanpetrino in the amount of $137.00 with intent to defraud, in violation of R.C. 1115.23, as charged in the seventh count of the indictment; and we find defendant Louis S. Kerr guilty of uttering check to Acme Auto Radiator Co., in the amount of $362.50, with intent to defraud, in violation of R.C. 1115.23, as charged in the eighth count of the indictment; and we find defendant Louis S. Kerr guilty of uttering check to Dick Kissroczi in the amount of $100.00 with intent to defraud, in violation of R.C. 1115.23, as charged in the ninth count of the indictment; and we find defendant Louis S. Kerr not guilty of uttering check with intent to defraud as charged in the tenth count of the indictment; and we find defendant Louis S. Kerr guilty of uttering check to George Foltz in the amount of $120.25, with intent to defraud, in violation of R.C. 1115.23, as charged in the eleventh count of the indictment; and we find defendant Louis S. Kerr guilty of uttering check to George Foltz in the amount of $88.97, with intent to defraud, in violation of R.C. 1115.23, as charged in the twelfth count of the indictment; and we find defendant Louis S. Kerr not guilty of uttering check with intent to defraud, as charged in the thirteenth count of the indictment; and we find defendant Louis S. Kerr not guilty of uttering check with intent to defraud, as charged in the fourteenth count of the indictment; and we find defendant Louis S. Kerr not guilty of uttering check with intent to defraud, as charged in the fifteenth count of the indictment."

Thereupon, the court passed this case for sentence, pending filing and hearing on motion for new trial, and defendant is released on same bond.

JOHN M. MANOS,
Judge.

APPENDIX 3.

JOURNAL ENTRY OF SENTENCE, COURT OF COMMON PLEAS, CASE NO. 79072.

(December 5, 1964.)

No. 79072.

IN THE COURT OF COMMON PLEAS.

STATE OF OHIO, CUYAHOGA COUNTY, SS.

STATE OF OHIO,
Plaintiff,
vs.
LOUIS S. KERR,
Defendant.

JOURNAL ENTRY.

This cause came on this day for hearing on defendant's motion for new trial, and the court upon hearing denied said motion.

And thereupon, the defendant Louis S. Kerr being in court was informed of the verdict of the jury, and inquired of if he had anything to say why judgment should not be pronounced against him, and he having nothing but what he hath already said:

It is, therefore, ordered and adjudged by the court that defendant Louis S. Kerr be imprisoned and confined in the Ohio Penitentiary, Columbus, Ohio, for in indeterminate period, and that he pays the costs of this prosecution, for which execution is awarded.

It is ordered by the court that defendant Louis S. Kerr is sentenced on all ten counts in the indictment, with the sentences on the first and second counts being served consecutively; and sentences on counts three, four, five, six, seven, eight, nine and ten are to run concurrently, and to be served concurrently with sentence on the second count.

Defendant is ordered released on same bond pending appeal for new trial.

JOHN M. MANOS,
Judge.

APPENDIX 4.

JOURNAL ENTRY OF SENTENCE, COURT OF COMMON PLEAS, CASE NO. 79231.

(December 5, 1964.)

No. 79231.

IN THE COURT OF COMMON PLEAS.

STATE OF OHIO, CUYAHOGA COUNTY, SS.

STATE OF OHIO,

Plaintiff,

vs.

LOUIS S. KERR,

Defendant.

JOURNAL ENTRY.

This cause came on this day for hearing on defendant's motion for new trial, and the court upon hearing denies said motion.

And thereupon, the defendant Louis S. Kerr being in court was informed of the verdict of the jury, and was inquired of if he had anything to say why judgment should not be pronounced against him, and he having nothing but what he hath already said:

It is, therefore, ordered and adjudged by the court that defendant Louis S. Kerr be imprisoned and confined in the Ohio Penitentiary, Columbus, Ohio, for an indeterminate period, and that he pay the costs of this prosecution for which execution is awarded.

It is further ordered by the court that sentences on the third and seventh counts are to be served consecutively; sentences on counts two, four, eight, nine, eleven, and twelve are to run concurrently, and to be served concurrently with sentence on the 7th count.

Defendant is to be released on same bond pending appeal for new trial.

JOHN M. MANOS,
Judge.

APPENDIX 5.

JOURNAL ENTRY OF THE COURT OF APPEALS.

(July 20, 1970.)

No. 27281.

IN THE COURT OF APPEALS.
EIGHTH JUDICIAL DISTRICT OF OHIO,
CUYAHOGA COUNTY.

STATE OF OHIO,
Appellee,
vs.
LOUIS S. KERR,
Appellant.

JOURNAL ENTRY.

This cause came on to be heard on the appeal on questions of law from the judgment of the Court of Common Pleas, and was argued by counsel for the parties; and upon consideration of all of the errors assigned, the Court finds no error prejudicial to the appellant and therefore the judgment of the Court of Common Pleas is affirmed. It is ordered that appellee recover of the appellant its costs herein expended.

It is further ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Appellant excepts.

CHAS. W. WHITE,
Presiding Judge.

APPENDIX 6.

ORDER OF THE SUPREME COURT OF OHIO SUSTAINING MOTION TO DISMISS.

(February 17, 1971.)

No. 70-749.

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS.

STATE OF OHIO,

Appellee,

vs.

LOUIS S. KERR,

Appellant.

MOTION TO DISMISS MOTIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY.

It is ordered by the Court that these motions to dismiss are sustained.

(Duly Certified.)

APPENDIX 7.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING.

(March 17, 1971.)

No. 70-749.

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS.

STATE OF OHIO,

Appellee,

vs.

LOUIS S. KERR,

Appellant.

REHEARING.

It is ordered by the court that rehearing in this case is denied.

(Duly Certified.)

APPENDIX 8.

ORDER OF THE SUPREME COURT OF OHIO STAYING EXECUTION OF SENTENCE.

(March 29, 1971.)

No. 70-749.

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS.

STATE OF OHIO,

Appellee,

vs.

LOUIS S. KERR,

Appellant.

ENTRY.

(CUYAHOGA COUNTY.)

Upon consideration of the motion, filed by counsel for Appellant, to stay execution of sentence and continue bond pending the timely filing of an appeal to The Supreme Court of the United States, it is therefore

ORDERED that execution of sentence be, and the same hereby is, stayed for a period of twenty (20) days from this date to enable counsel for appellant to apply to The Supreme Court of the United States for an indefinite stay. It is further ordered that bond continue for this same twenty day period.

C. WILLIAM O'NEILL,
Chief Justice.

(Duly Certified.)

APPENDIX 9.

ENDORSED ORDER OF THE SUPREME COURT OF THE UNITED STATES DATED APRIL 21, 1971, DENYING APPLICATION FOR STAY.

SUPREME COURT OF THE UNITED STATES.
OFFICE OF THE CLERK
Washington, D. C., 20543
April 21, 1971

Reuben M. Payne, Esquire
Sindell, Sindell, Bourne, etc.
1400 Leader Building
Cleveland, Ohio 44114

Re: *Kerr v. Ohio, Oct. Term, 1970*

Dear Mr. Payne:

Your "Application for an order staying the execution and enforcement of the judgment of the Supreme Court of Ohio" was presented to Mr. Justice Stewart who endorsed thereon:

"Application denied.
Potter Stewart
April 20, 1971"

Very truly yours,
E. ROBERT SEAVER, *Clerk*,
By ROBERT N. BOYER,
Assistant.

iaw
cc: John T. Corrigan, Esquire

APPENDIX 10.

ORDER OF THE SUPREME COURT OF THE UNITED STATES DENYING APPLICATION FOR STAY DATED MAY 17, 1971.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
Washington, D. C., 20543

May 17, 1971

Reuben M. Payne, Esq.
Sindell, Sindell, Bourne, etc.
1400 Leader Bldg.
Cleveland, Ohio 44114

RE: LOUIS S. KERR *v.* OHIO,
No. ____, Oct. Term, 1970

Dear Sir:

The Court today entered the following order in the above-entitled case:

The application for a stay presented to Mr. Justice Stewart, and by him referred to the Court, is denied.

Very truly yours,
E. ROBERT SEAVER, *Clerk*,
By C. T. SYDELONE,
Assistant Clerk.

cc: Clerk
Supreme Court of Ohio
Columbus, Ohio

cc: John T. Corrigan, Esq.
Prosecuting Attorney
County of Cuyahoga
Criminal Courts Bldg. - 1560 East 21st St.
Cleveland, Ohio 44114

APPENDIX 11.

ORDER OF THE SUPREME COURT OF THE UNITED STATES EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

SUPREME COURT OF THE UNITED STATES.

No. _____, October Term, 1970.

LOUIS S. KERR,

Petitioner,

v.

OHIO.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 14, 1971.

S/ POTTER STEWART,

Associate Justice of the Supreme Court of the United States.

Dated this 18th day of June, 1971.

APPENDIX 12.

SECTION 1115.23, OHIO REVISED CODE.

§ 1115.23. Drawing check or draft without credit and with intent to defraud.

"Credit," as used in this section, means any contract or agreement with a bank or depository for the payment, when presented, of a check, draft, or order for the payment of money.

No person, with intent to defraud, shall make, draw, utter, or deliver any check, draft, or order for the payment of money upon any bank or other depository if such person, at the time, has insufficient funds or credit with such bank or depository.

As against the maker or drawer, the making, drawing, uttering, or delivering of a check, draft, or order, payment of which is refused by the drawee bank or depository, shall be prima-facie evidence of intent to defraud and of knowledge of insufficient funds in, or credit with, such bank or depository.

APPENDIX 13.

SECTION 1303.56, OHIO REVISED CODE.

§ 1303.56. When presentment, notice of dishonor, and protest necessary or permissible.

(A) Unless excused as provided in section 1303.66 of the Revised Code, presentment is necessary to charge secondary parties as follows:

(1) presentment for acceptance is necessary to charge the drawer and indorsers of a draft where the draft so provides, or is payable elsewhere than at the residence or place of business of the drawee, or its date of payment depends upon such presentment. The holder may at his

option present for acceptance any other draft payable at a stated date;

(2) presentment for payment is necessary to charge any indorser;

(3) in the case of any drawer, the acceptor of a draft payable at a bank or the maker of a note payable at a bank, presentment for payment is necessary, but failure to make presentment discharges such drawer, acceptor, or maker only as stated in division (A) (2) of section 1303.57 of the Revised Code.

(B) Unless excused, as provided in section 1303.66 of the Revised Code:

(1) a notice of any dishonor is necessary to charge any indorser;

(2) in the case of any drawer, the acceptor of a draft payable at a bank or the maker of a note payable at a bank, notice of any dishonor is necessary, but failure to give such notice discharges such drawer, acceptor, or maker only as stated in division (A) (2) of section 1303.57 of the Revised Code.

(C) Unless excused, as provided in section 1303.66 of the Revised Code, protest of any dishonor is necessary to charge the drawer and indorsers of any draft which on its face appears to be drawn or payable outside of the states and territories of the United States and the District of Columbia. The holder may at his option make protest of any dishonor of any other instrument and in the case of a foreign draft may on insolvency of the acceptor before maturity make protest for better security.

(D) Notwithstanding any provision of this section, neither presentment nor notice of dishonor nor protest is necessary to charge an indorser who has indorsed an instrument after maturity.

APPENDIX 14.

SECTION 1303.57, OHIO REVISED CODE.

§ 1303.57. Unexcused delay; discharge.

(A) Where without excuse any necessary presentment or notice of dishonor is delayed beyond the time when it is due:

(1) any indorser is discharged; and

(2) any drawer or the acceptor of a draft payable at a bank or the maker of a note payable at a bank who because the drawee or payor bank becomes insolvent during the delay is deprived of funds maintained with the drawee or payor bank to cover the instrument may discharge his liability by written assignment to the holder of his rights against the drawee or payor bank in respect of such funds, but such drawer, acceptor, or maker is not otherwise discharged.

(B) Where without excuse a necessary protest is delayed beyond the time when it is due any drawer or indorser is discharged.

APPENDIX 15.

SECTION 1303.58, OHIO REVISED CODE.

§ 1303.58. Time of presentment.

(A) Unless a different time is expressed in the instrument the time for any presentment is determined as follows:

(1) where an instrument is payable at or a fixed period after a stated date any presentment for acceptance must be made on or before the date it is payable;

(2) where an instrument is payable after sight it must either be presented for acceptance or negotiated within a reasonable time after date or issue whichever is later;

(3) where an instrument shows the date on which it is payable presentment for payment is due on that date;

(4) where an instrument is accelerated presentment for payment is due within a reasonable time after the acceleration;

(5) with respect to the liability of any secondary party, presentment for acceptance or payment of any other instrument is due within a reasonable time after such party becomes liable thereon.

(B) A reasonable time for presentment is determined by the nature of the instrument, any usage of banking or trade and the facts of the particular case. In the case of an uncertified check which is drawn and payable within the United States and which is not a draft drawn by a bank, the following are presumed to be reasonable periods within which to present for payment or to initiate bank collection:

(1) with respect to the liability of the drawer, thirty days after date or issue whichever is later; and

(2) with respect to the liability of an indorser, seven days after his indorsement.

(C) Where any presentment is due on a day which is not a full business day for either the person making presentment or the party to pay or accept, presentment is due on the next following day which is a full business day for both parties.

(D) Presentment to be sufficient must be made at a reasonable hour, and if at a bank during its banking day.

APPENDIX 16.

SECTION 1303.59, OHIO REVISED CODE.

§ 1303.59. How presentment made.

(A) Presentment is a demand for acceptance or payment made upon the maker, acceptor, drawee, or other payor by or on behalf of the holder.

(B) Presentment may be made:

(1) by mail, in which event the time of presentment is determined by the time of receipt of the mail; or

(2) through a clearing house; or

(3) at the place of acceptance or payment specified in the instrument or if there be none at the place of busi- or residence of the party to accept or pay. If neither the party to accept or pay nor anyone authorized to act for him is present or accessible at such place presentment is excused.

(C) It may be made:

(1) to any one of two or more makers, acceptors, drawees or other payors; or

(2) to any person who has authority to make or refuse the acceptance or payment.

(D) A draft accepted or a note made payable at a bank in the continental United States must be presented at such bank.

(E) In the cases described in section 1304.16 of the Revised Code, presentment may be made in the manner and with the result stated in that section.

APPENDIX 17.

SECTION 1303.60, OHIO REVISED CODE.

§ 1303.60. Rights of party to whom presentment is made.

(A) The party to whom presentment is made may without dishonor require:

(1) exhibit of the instrument; and

(2) reasonable identification of the person making presentment and evidence of his authority to make it if made for another; and

(3) that the instrument be produced for acceptance or payment at a place specified in it, or if there be none at any place reasonable in the circumstances; and

(4) a signed receipt on the instrument for any partial or full payment and its surrender upon full payment.

(B) Failure to comply with any such requirement invalidates the presentment but the person presenting has a reasonable time in which to comply and the time for acceptance or payment runs from the time of compliance.

APPENDIX 18.

SECTION 1303.61, OHIO REVISED CODE.

§ 1303.61. Time allowed for acceptance or payment.

(A) Acceptance may be deferred without dishonor until the close of the next business day following presentment. The holder may also in a good faith effort to obtain acceptance and without either dishonor of the instrument or discharge of secondary parties allow postponement of acceptance for an additional business day.

(B) Except as a longer time is allowed in the case of documentary drafts drawn under a letter of credit, and unless an earlier time is agreed to by the party to pay, payment of an instrument may be deferred without dishonor pending reasonable examination to determine whether it is properly payable, but payment must be made in any event before the close of business on the day of presentment.

APPENDIX 19.

SECTION 1303.66, OHIO REVISED CODE.

§ 1303.66. Waived or excused presentment, protest, or notice of dishonor.

(A) Delay in presentment, protest, or notice of dishonor is excused when the party is without notice that it is due or when the delay is caused by circumstances beyond his control and he exercises reasonable diligence after the cause of the delay ceases to operate.

(B) Presentment or notice or protest as the case may be is entirely excused when:

(1) the party to be charged has waived it expressly or by implication either before or after it is due; or

(2) such party has himself dishonored the instrument or has countermanded payment or otherwise has no reason to expect or right to require that the instrument be accepted or paid; or

(3) by reasonable diligence the presentment or protest cannot be made or the notice given.

(C) Presentment is also entirely excused when:

(1) the maker, acceptor, or drawee of any instrument except a documentary draft is dead or in insolvency proceedings instituted after the issue of the instrument; or

(2) acceptance or payment is refused but not for want of proper presentment.

(D) Where a draft has been dishonored by nonacceptance a later presentment for payment and any notice of dishonor and protest for nonpayment are excused unless in the meantime the instrument has been accepted.

(E) A waiver of protest is also a waiver of presentment and of notice of dishonor even though protest is not required.

(F) Where a waiver of presentment or notice or protest is embodied in the instrument itself it is binding upon all parties; but where it is written above the signature of an indorser it binds him only.

APPENDIX 20.

SECTION 1303.67, OHIO REVISED CODE.

§ 1303.67. Discharge of parties.

(A) The extent of the discharge of any party from liability on an instrument is governed by:

(1) Section 1303.69 of the Revised Code on payment or satisfaction; or

(2) Section 1303.70 of the Revised Code on tender of payment; or

(3) Section 1303.71 of the Revised Code on cancellation or renunciation; or

(4) Section 1303.72 of the Revised Code on impairment of right of recourse or of collateral; or

(5) Section 1303.29 of the Revised Code on reacquisition of the instrument by a prior party; or

(6) Section 1303.43 of the Revised Code on fraudulent and material alteration; or

(7) Section 1303.47 of the Revised Code on certification of a check; or

(8) Section 1303.48 of the Revised Code on acceptance varying a draft; or

(9) Section 1303.57 of the Revised Code on unexcused delay in presentment or notice of dishonor or protest.

(B) Any party is also discharged from his liability on an instrument to another party by any other act or agreement with such party which would discharge his simple contract for the payment of money.

(C) The liability of all parties is discharged when any party who has himself no right of action or recourse on the instrument:

(1) reacquires the instrument in his own right; or

(2) is discharged under any provision of sections 1303.01 to 1303.78, inclusive, of the Revised Code, except as otherwise provided in section 1303.72 of the Revised Code with respect to discharge for impairment of recourse or of collateral.

APPENDIX 21.

SECTION 2315.06, OHIO REVISED CODE.

§ 2315.06. Court to inform jury.

After the jurors retire to deliberate, if they disagree as to the testimony or desire to be further informed on the law of the case, they may request the officer in charge to conduct them to the court, which shall give the information sought upon matters of law, and also, in the presence of or after notice to the parties or their counsel, the court may state its recollection of the testimony upon a disputed point.

APPENDIX 22.

SECTION 2907.21, OHIO REVISED CODE.

§ 2907.21. Larceny by trick.

No person shall obtain possession of, or title to, anything of value with the consent of the person from whom he obtained it, provided he induced such consent by false or fraudulent representation, pretense, token, or writing.

Whoever violates this section is guilty of larceny by trick, and, if the value of the thing so obtained is sixty dollars or more, shall be imprisoned not less than one nor more than seven years. If the value is less than sixty dollars, such person shall be fined not more than three hundred dollars or imprisoned not more than ninety days, or both.

APPENDIX 23.

SECTION 2913.01, OHIO REVISED CODE.

§ 2913.01. Forgery.

No person, with intent to defraud, shall falsely make, alter, forge, counterfeit, print, or photograph a record or other authentic matter of a public nature, a license or certificate authorized by law, a charter, letters patent, deed, lease, writing obligatory, will, testament, annuity, bond, covenant, bank bill or note, check, bill of exchange, contract, promissory note for the payment of money or other property, or any promise to pay money conditionally, an acceptance of a bill of exchange, the number or principal sum of an accountable receipt for a note, an order, warrant, or request for the payment of money or the delivery of goods or chattels, an acquittance or receipt either for money or goods, an acquittance, release, or discharge of a debt, account, action, suit, demand, or other thing, real or personal, a plat, draft, or survey of land, transfer or assurance of money, stock, goods, chattels, or other property, a letter of attorney, a power to receive money or receive and transfer stock or annuities, or to let, lease, dispose of, alien, or convey goods, chattels, lands, tenements, or other estate, real or personal, or a bill, order, or warrant drawn by an auditor for the payment of money at a public treasury, or, with like intent, utter or publish as true and genuine such false, altered, forged, counterfeited, falsely printed, or photographed matter, knowing it to be false, altered, forged, counterfeited, falsely printed, or photographed.

Whoever violates this section is guilty of forgery, and shall be imprisoned not less than one nor more than twenty years.

APPENDIX 24.

SECTION 2941.04, OHIO REVISED CODE.

§ 2941.04. Two or more offenses in one indictment.

An indictment or information may charge two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated.

The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict. The court in the interest of justice and for good cause shown, may order different offenses or counts set forth in the indictment or information tried separately or divided into two or more groups and each of said groups tried separately. A verdict of acquittal of one or more counts is not an acquittal of any other count.

APPENDIX 25.

SECTION 2941.30, OHIO REVISED CODE.

§ 2941.30. Amending an indictment.

The court may at any time before, during, or after a trial amend the indictment, information, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment or information or to cure a variance between the indictment or information and the proof, the accused is entitled to a discharge of the jury on his motion, if a jury has been impaneled, and to a reasonable continuance of the cause, unless it clearly appears from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that his rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. In case a jury is discharged from further consideration of a case under this section, the accused was not in jeopardy. No action of the court in refusing a continuance or postponement under this section is reviewable except after motion to and refusal by the trial court to grant a new trial therefor, and no appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court finds that the accused was prejudiced in his defense or that a failure of justice resulted.

APPENDIX 26.

SECTION 2945.36, OHIO REVISED CODE.

§ 2945.36. For what cause jury may be discharged.

The trial court may discharge a jury without prejudice to the prosecution:

(A) For the sickness or corruption of a juror or other accident or calamity;

(B) Because there is no probability of such jurors agreeing;

(C) If it appears after the jury has been sworn that one of the jurors is a witness in the case;

(D) By the consent of the prosecuting attorney and the defendant.

The reason for such discharge shall be entered on the journal.

APPENDIX 27.

SECTION 2945.59, OHIO REVISED CODE.

§ 2945.59. Proof of defendant's motive.

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

APPENDIX 28.

SECTION 2945.79, OHIO REVISED CODE.

§ 2945.79. Causes for new trial.

A new trial, after a verdict of conviction, may be granted on the application of the defendant for any of the following causes affecting materially his substantial rights:

(A) Irregularity in the proceedings of the court, jury, prosecuting attorney, or the witnesses for the state, or for any order of the court, or abuse of discretion by which the defendant was prevented from having a fair trial;

(B) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;

(C) Accident or surprise which ordinary prudence could not have guarded against;

(D) That the verdict is not sustained by sufficient evidence or is contrary to law; but if the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and pass sentence on such verdict or finding as modified, provided that this power extends to any court to which the cause may be taken on appeal;

(E) Error of law occurring at the trial;

(F) When new evidence is discovered material to the defendant, which he could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing of said motion, in support thereof, the affidavits

of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as under all the circumstances of the case is reasonable. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

APPENDIX 29.

SECTION 4505.19(F), OHIO REVISED CODE.

§ 4505.19. Altering or forging forms; false statements.

No person shall:

* * * * * *

(F) Purport to sell or transfer a motor vehicle without delivering to the purchaser or transferee thereof a certificate of title, or a manufacturer's or importer's certificate thereto, assigned to such purchaser as provided for in such sections.

APPENDIX 30.

CONSTITUTION OF THE UNITED STATES, SIXTH AMENDMENT.

AMENDMENT VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

APPENDIX 31.

CONSTITUTION OF THE UNITED STATES, FOURTEENTH AMENDMENT.

SECTION I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX 32.

CONSTITUTION OF THE STATE OF OHIO, ARTICLE I, SECTION 10.

10. Trial for crimes; witness.

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (Adopted Sept. 3, 1912.)

APPENDIX 33.

EXCERPTS FROM TRANSCRIPT OF TESTIMONY PERTAINING TO REASON FOR GRANTING WRIT NO. VIII.

(R. 332-338):

"Q. And you say that you have not seen State's Exhibit 37 before, is that correct? A. I have seen one like it.

Q. But you have not seen this document before? A. No.

Q. And this is not your writing? A. No.

Mr. Smith: If the Court please, I would like to claim surprise of this witness. I would like to have the right to cross-examine the witness.

The Court: Approach the bench.

(Thereupon, discussion was had between Court and counsel, off the record and outside hearing of the jury.)

The Court: You may note your exceptions, Mr. Benjamin.

Mr. Benjamin: All right. Exception.

CROSS-EXAMINATION OF RICHARD KISSROCZI UPON SURPRISE TESTIMONY.

By Mr. Smith:

Q. Now, Mr. Kissroczi, on October 2, 1963, did you have occasion to talk with members of the Bureau of Motor Vehicles? A. Yes, I did.

Q. Specifically, Mr. Hill and Miss Helen Abrams? A. Yes.

Q. Where did this conversation take place? A. West 3rd Street at the office of the Bureau of Motor Vehicles.

Q. Office of the Bureau of Motor Vehicles, is that correct? A. Yes.

Q. Now, at that time didn't you tell them that: 'Some time about the last week of July, 1963 I was instructed by Louis Kerr to pick up a certificate of title in the name of Jay E. Williams in the main office of Central National Bank, East 6th and Euclid Avenue, Cleveland, Ohio.' Did you tell them that? A. If I made that statement I told them, yes.

Q. Did you further tell them this: 'That on or about the same time I picked up title 181424551 and returned it to Mr. Louis Kerr as per his instructions.' Did you say that? A. I said that, yes.

Q. Did you say this: 'Upon returning to Kerr Motors Mayfield location I proceeded to Louis Kerr's office and turned over to Mr. Kerr certificate of title in question.' A. Yes.

Q. And did you say this: 'Some time later that day Mr. Williams' title was handed to me by Louis Kerr with the instructions that I should sign Jay E. Williams' name to the assignment portion of Certificate of Title No. 181424551.' A. Yes.

Q. And did you say this: 'Upon signing Mr. Williams' name Mr. Kerr instructed me to have Edward E. Peltz notarize the signature of Jay E. Williams and process this title into L. S. Kerr Motors, Incorporated's name.' A. Yes.

Q. And did you say this: 'On August 1st, 1963 Certificate of Title in question was presented to Mr. Peltz with Jay E. Williams' name already added by me and, thereupon, Mr. Peltz notarized same and returned Mr. Williams' title to me, wherefore, I put it in Cuyahoga County Auto Title Bureau August 1, 1963, and processed Mr. Williams' title into L. S. Kerr Motors, Incorporated name and, thereupon returned L. S. Kerr Motors new title to Mr. Louis Kerr as per his instructions.' A. Yes.

Q. Did you say this: 'On October 2nd, 1963 I was contacted by investigator Hill and ordered to report to the Bureau of Motor Vehicles office and upon arriving I was shown an analysis report by Joseph Tholl, handwriting examiner of questionable documents.' Did you say that? A. Yes.

Q. And were you asked this question: 'Show you Certificate of Title No. 181424551 in the name of Jay E. Williams and the assignment part thereof which also bears signature of Jay E. Williams, what can you tell us about the signature of Jay E. Williams?' Your answer: 'The face of this title was issued in the name of Jay E. Williams and the assignment portion of this title bears the signature or name of Jay E. Williams, which I signed by order of Mr. Louis Kerr.' A. Yes.

Q. And was this question asked of you: 'Show you Certificate of Title No. 182138613 dated 8/5/63 in the name of L. S. Kerr Motors. What can you tell us about this title?' Your answer: —Was this your answer: 'This is a new title that was transferred by my signing Jay E. Williams' name to the portion of the assignment part thereon.' A. Yes.

Q. Now, on September the 16th, 1963, did you have occasion, also, to be at the Bureau of Motor Vehicles? A. I think so. I'm not sure.

Mr. Benjamin: I object.

The Court: The objection is sustained.

Q. You don't know whether you were there or not? A. Lot of titles every day. I couldn't tell you.

Q. Well, did you have occasion to talk to Mr. Paul Hill and Miss Helen Abram on the 15th day of September, 1963?. A. I think so.

Q. Now, on that day did you tell Mr. Hill that on July 31, 1963 'I went to the dealership of L. S. Kerr

Motors, Incorporated, at 3957 Mayfield Road, Cleveland Heights, Cleveland, Ohio, to purchase 1963 Studebaker Lark Wagoneer'? A. I didn't purchase no wagon.

The Court: The question to you is: Did you say that?

The Witness: I don't know—

The Court: All right. Say I don't know. Answer the question.

Mr. Smith: I'm sorry. Withdraw that and withdraw the answer. I'm sorry.

Q. Did you say this, Mr. Kissroczi—

The Court: When, now? Everything has been withdrawn, Mr. Prosecutor.

Q. On October 3, 1963, did you have a conversation with Mr. Hill and Miss Abrams— A. Yes.

Q. —Bureau of Motor Vehicles? And did you say this: 'The following statement is regarding forgery of Certificate of Title No. 182001635 and power of attorney application from customer to assign the title on trade-in car dated July 11, 1963.' A. (Inaudible)

The Court: You don't understand the question?

The Witness: Well, he's talking numbers.

The Court: Do you understand the question?

The Witness: No, I don't.

The Court: Thank you.

Q. Well, did you have this conversation with Mr. Hill? A. I had conversation with Mr. Hill.

Q. Did you say this: 'July 11, 1963 I was employed at L. S. Kerr Motors, Incorporated, and on this date I was instructed by Mr. Louis Kerr, president of L. S. Kerr Motors, Incorporated, to go to the Auto Club main office, 2500 Euclid Avenue, Cleveland, Ohio, with a piece of

paper that Louis Kerr had given me which authorized Kerr Motors to pick up Certificate of Title No. 182001635 issued in Herman Adelstein's name.' A. Yes.

Mr. Benjamin: Objection.

The Court: Objection sustained.

Q. Now, Mr. Kissroczi, did you pick up any title from the Automobile Club for Louis Kerr Motors? A. Yes, I did.

Q. Whose title did you pick up? A. Dr. Herman Adelstein's.

Q. What did you do with this title? A. This title?

Q. Yes. A. Had it transferred into Kerr Motors name.

Q. When you say you had it transferred into Kerr Motors Incorporated, will you tell us what you did? A. First thing I did was Mr. Kerr call me in the office and told me to go pick up this title, have it transferred into Kerr Motors name. So I went to the business office, checked Dr. Adelstein's jacket. There was no power of attorney there and I went back to Mr. Kerr and I told him there was no power of attorney and Mr. Kerr stated that it was all right, Dr. Adelstein had given us power to sign."

In the Supreme Court of the United States

OCTOBER TERM 1970.

No. 71-161.

LOUIS S. KERR,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF RESPONDENT IN OPPOSITION.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised both in the Court of Appeals of Cuyahoga County, Ohio but have not been presented to the Supreme Court of Ohio. The Court of Appeals affirmed without writing an opinion, and the Ohio Supreme Court sustained the State's motion to dismiss for failure to perfect a timely appeal.

The Ohio Appellate court decided this case in accordance with the statutes of the State of Ohio and in accordance with the Constitution of the United States and the applicable decisions of this Court. There is therefore no substantial federal question involved.

STATEMENT OF THE CASE.

Louis S. Kerr was tried to a jury and found guilty of a total of 22 counts charged in two indictments. One indictment contained ten counts of selling a motor vehicle without delivering to the purchaser thereof a certificate of title, as follows:

Count 1—1962 Chevrolet to Chester Basnett
2—1961 Ford to Andrew Ryba
3—1963 Studebaker to Susan Cass
4—1963 Studebaker to Anna Vogel
5—1961 Chrysler to Sam Dituri
6—1963 Studebaker Lark to Charles Sefcovic
7—1963 Studebaker Hawk to Jay Williams
8—1962 Studebaker Lark to Marcia Nease
9— Studebaker Wagoneer to Rheta Fugueroa
10—1963 Studebaker Wagoneer to Roy L. Bolton

The charges in the second indictment of which Kerr was found guilty were:

Count 2—Obtaining an automobile of the value of $2,237 from Evan B. Brewster by false representation
3—Forgery of power of attorney from Herman Adelstein
4—Uttering above forged power of attorney
7—Uttering check with insufficient funds, payee Julius Sanpetrino
8—Uttering check with insufficient funds, payee Acme Radiator
9—Uttering check with insufficient funds, payee Alex Gaye
10—Uttering check with insufficient funds, payee May Company

11—Uttering check with insufficient funds, payee May Company
12—Uttering check with insufficient funds, payee May Company
13—Uttering check with insufficient funds, payee May Company
14—Uttering check with insufficient funds, payee May Company
15—Uttering check with insufficient funds, payee May Company

THE STATE'S EVIDENCE.

All the offenses occurred in the summer of 1963 at the Louis S. Kerr Motors, Inc. automobile sales agency branches on Mayfield Road in Cleveland Heights and Ridge Road in Parma.

In the first part of July 1963 *Susan Cass* went to the Kerr agency to buy a car. After she made a test drive on a Studebaker Lark and conversation with Mr. Kerr about a car of the desired color, a contract (St. Ex. 1) was written up. The price was $1,990. Mrs. Cass' husband, Edward Cass, was shown as the purchaser. Mrs. Cass paid for the car with a check for $1,990 signed by her father. While the salesman was writing up the contract, Mr. Kerr showed them color charts, and assured them he could get a car of the color they preferred. The deal included the trading in of their old car; Mr. Kerr approved the trade-in allowance. When Mr. and Mrs. Cass received the new car that afternoon it had dealer's plates. When she took it in three weeks later to have a heater installed she inquired why they had not received the certificate of title. Later she phoned Mr. Kerr about the title. He said there was gross incompetence in his office, he would see to it immediately. At the end of that week

Mrs. Cass drove to Kerr Motor Sales and complained about the lack of title.

On March 31, 1964, just in time to get license plates, Mr. and Mrs. Cass received a certificate of title. They never received a clear title to the car they bought and the memorandum certificate of title they did receive showed a lien of $1,325. When they signed the purchase agreement and gave the salesman the check they did not owe anything on the car. Mrs. Cass' father was buying a car for her and they bought it in her husband's name.

The records of the Clerk of Courts of Cuyahoga County showed a lien of $1,325 to Evan B. Brewster of Akron. The date of the lien was March 31, 1964.

Early in August, 1963 *Charles Sefcovic* went to the Parma office of the Kerr Motor Sales after being called by a salesman and asked if he was interested in a car. The Sefcovics did not buy one on that occasion but they returned on August 10th and selected a 1963 Studebaker, giving the salesman a $10 deposit. An allowance of $658 was made for their old car. On August 12 they returned to pick up the new car and turned over a check for $1,693.76 in full payment. The manager changed their old license plates to the new car. They turned over the certificate of title to the old car after signing it on the back.

About a week later, when the Sefcovics went back to Kerr Motors after some adjustment had been made on the new car, they asked the manager about the title. They called again at the Kerr Motors and then Mr. Sefcovic made a series of telephone calls asking for the certificate of title. He never did receive it.

The records of the Clerk of Courts showed a chattel mortgage of $1,899.59 to the Union Acceptance Corporation, 75 Public Square, dated March 31, 1964, on the automobile in question.

About the first of August, 1963, *Marcia Nease,* a teacher, took her 1959 Studebaker Lark to the Kerr Motors to have it repaired. While there she looked at new cars and decided to buy a 1963 Lark. The car she wanted was not in the salesroom. She went to Erie, Pennsylvania, and while she was there a salesman from Kerr Motors came to see her and brought with him a 1962 Lark. About two weeks later Miss Nease went to the Kerr Motors Parma branch and bought the 1962 Studebaker Lark that the salesman had brought to Erie, paying for it with two checks and $5 cash. She did not receive any certificate of title for the new car. Title to her old car was turned over to the Kerr salesman. When she inquired of Mr. Kerr about the certificate of title, he told her it was in the hands of his attorney, Mr. Nosan. In September, 1963, Miss Nease was informed by Mr. Evan Brewster of Akron, that he had title to that car.

The records of the Clerk of Courts concerning the original certificate of title to the car in question showed an undischarged chattel mortgage of $1,616 to Evan Brewster, dated May 13, 1963, and an assignment to Miss Nease by "Marvin R. Blane," attorney for the trustee for L. S. Kerr Motors, dated March 26, 1964.

Sam Dituri bought a 1961 Chrysler Imperial in July of 1963 from the L. S. Kerr Motors, Parma branch. He paid $1,942.10 in cash and traded in a 1959 Chevrolet valued at $600. Mr. Dituri never received title to the Chrysler and although he had possession of the car at the time he testified in this case, he could not drive it. He could not get license plates because he did not have title to the car. When Mr. Dituri went to Kerr Motors a week after he bought the Chrysler to ask for the title he was told it had not come yet, to wait a week or ten days. He continued going there every other week. Mr. Dituri testified: (R. 149)

"Well, told me wait, told me the last time I call that is the Kerr Motor himself, and he told me, he said the clerk was on a vacation, he said, that is why the delay the title to come, but seeing the clerk is here now you get the title, maybe tomorrow. So two days after he close up the place, so I never get no more title."

The Clerk of Court's records show a certificate of title from Rutherford Motor Sales of Akron, assigned to L. S. Kerr Motors, and a new certificate of title in the name of Kerr Motors showing an unsatisfied lien of $2,095 held by Evan B. Brewster.

Anna E. Vogel, retired, visited the Kerr Motors about July 30, 1963, to buy a Studebaker car. She selected a white Lark DeLuxe model, on which delivery was to be made in a few days. The contract drawn up by the Kerr salesman stipulated a price of $2,215.53, to be paid by a trade-in allowance of $750.00 for her 1960 Valiant, a cash deposit of $550.00, and the balance of $1,000.00 to be paid on delivery. She paid the deposit with two checks, for $200 and $350, respectively, and turned in the assigned certificate of title to the Valiant. About ten days later, when she had not received the new car although she had turned in the title to her old one, she went to the showroom and talked to Mr. Kerr. In the course of the conversation Kerr told her to go home and call him in the morning. A few days later Miss Vogel went in and demanded her down payment and the certificate of title to the Valiant.

Miss Vogel learned from the Bureau of Motor Vehicles that there was a lien of $450 on the Valiant to Evan Brewster of Akron, Ohio. She bought the title back from Brewster for $100. She never received back any of the $550 she paid to Kerr Motors.

The records of the Clerk of Courts show a lien dated August 5, 1963 in the amount of $450 to Evan B. Brewster on the certificate of title to the Valiant in question. The lien was cancelled March 6, 1964. The District Court issued an order to the trustee to abandon this car.

Chester K. Basnett saw a 1962 Corvair in the west side lot of Kerr Motors that he was interested in. This was on August 8, 1963. After he drove the car around the block he discussed a price of $1,700 with a salesman, without agreement. The next day Mr. Basnett went back and informed another salesman that he would pay $1,700 cash. He had that amount with him in cash. He was told the sale would have to be approved by Mr. Kerr. After a phone call he signed a contract calling for a total price of $1,710.88 with no trade-in. Mr. Basnett took delivery of the car, which carried dealer's plates.

Mr. Basnett went back to Kerr Motors three days later to pick up his title but did not get it. He continued to demand his title every two or three days, but never received it. He testified (R. 202-203, 204)

> "Three weeks later I talked to Eugene Knable at west side branch, and I told him I wanted that title to my car, which he said he could not produce, and I told him, I said, well, I will have to get my lawyer. Eugene Knable then told me the best thing for me to do would be to get my lawyer, that the bottom had fallen out of everything, and I wouldn't get the title to my car. I then proceeded to the east side branch on Mayfield Road to speak to Mr. Kerr. Previously I made a phone call, but I couldn't get hold of him. I talked to his secretary about my car title. Went to see Mr. Kerr that day, and at that time he told me that he would get my title by Friday, if he delivered it to the house by some man, someone, and if I didn't receive my title on Friday, to call him personally and tell him.

Q. Was there any other discussion had at that time?

A. Yes, there was. He told me where the hold-up was on the title. He was having difficulty with income tax. Why, he said that the Government was after him for back income tax, couple years back, that the previous owner there didn't pay his income tax, and he was being stuck with it, more or less.

Q. Was there anything else said other than that?

A. Nothing only that he promised my title to the car on Friday."

It developed that Allstate Motors had legal title to that car and Mr. Basnett turned the car over to them. The records of the Clerk's office covering this car showed title was assigned by Ed Stinn Motor Sales to Allstate Motor Sales on July 9, 1963, and a certificate of title was issued to Allstate on September 22, 1963.

In June 1963 *Rheta Fugueroa* talked to Mr. Louis Kerr about a car she saw in the Kerr salesroom on Mayfield Road and about how much he would allow for a trade-in, payments, etc. She signed a purchase agreement for a total price of $2,900, less $420.84 for her old car. She gave Kerr $474.95 in cash, which left a balance of $2100. She financed this with the Cleveland Trust Company, receiving a check for $2100 which she turned over to Mr. Kerr. She received the new automobile. The Cleveland Trust Company requested that the certificate of title to the new car be turned over to them within ten days. Mr. Kerr said he would take care of it. Two weeks later the bank inquired of Miss Fugueroa as to where the title was. She related her subsequent conversation with Mr. Kerr (R. 213)

"I just told Mr. Kerr that I had received a phone call from the bank, and they said they had not received the title yet, and he said that I didn't need to worry,

> he would send the title down to the bank, and there were people on vacation, it was during vacation, and he said there were people on vacation and probably they had misplaced it."

After another communication from the branch manager of the bank, she tried to see Mr. Kerr and he was always tied up. When she finally saw him the following occurred: (R. 214)

> "Well, I told Mr. Kerr that I would like to have my title by that afternoon, and he asked me if I could wait two or three days more until he had a few things to straighten out."

Miss Fugueroa learned that Mr. Brewster had title to the car. She received a temporary title, which permitted her to obtain license plates. It showed a lien for $2,205 in favor of Mr. Brewster. The result was that in addition to the money owed the Cleveland Trust Company, there was the lien of $2,205. The records of the Clerk of Courts showed a certificate of title for this car issued to Rheta Fugueroa on May 26, 1964, previous owner, L. S. Kerr Motors, and a chattel mortgage to Brewster in the amount of $2,205.

On June 24, 1963, *Roy Bolton* went to the Kerr Motors to buy some parts. After talking with a salesman, George Foltz, he looked at cars and decided upon a 1963 Studebaker Hawk, pink in color. After a contract was drawn up, Don Warner told Mr. Bolton there was a more desirable car, a white one, on the West Side that he could take instead and he could have it for the same price of $3500. Mr. Bolton paid $3500 and received the car. A few days afterwards he talked to Mr. Warner, to Mr. Foltz, and to Mr. Kerr about title to the car and thereafter he went back about every week to ask for his title. He talked with Mr. Kerr several times. He never received the title to the

car, only a temporary certificate of title, which showed a lien of $3400 to the Union Acceptance Corporation.

Mr. Kerr deposited the Bolton's check for $3,500 before they were able to transfer funds to cover it and the check was returned. Mr. Bolton made it good. As to this, Mr. Bolton testified: (R. 233)

> "Q. Would you tell us what was said?
>
> A. Well, he wanted—he said he has got a big deal going, say you pay cash for the car it would help me out that much. So we wrote a check—my wife wrote a check out for the amount.
>
> Q. What was that?
>
> A. $3500. And told him not to get it cashed until after Thursday, because she had to work on Tuesday, this was Monday, she had to work on Tuesday, the bank was closed on Wednesday. She couldn't get to it again to change it from the savings account to checking account until Thursday."

The records of the Clerk of Courts showed a certificate of title in the name of Roy Bolton issued March 31, 1964, previous owner, L. S. Kerr Motors, Inc. and a chattel mortgage of $3,124.41 held by the Union Acceptance Corporation.

Jay E. Williams visited the West Side branch of Kerr Motors on July 31, 1963 to look at cars. Not seeing a car there, that he wanted, he discussed the possibility of ordering one from the manufacturer and was asked if he wanted to look at a car at the East Side branch. He went to the East Side and after talking to Mr. Kerr they drew up a purchase order for a 1963 Wagoneer, which was in the salesroom. The price was $1,381.77 and Williams' 1962 Volkswagen, which was given a trade-in allowance of approximately $1,100. The $1,381.77 was paid by bank check and the Wagoneer picked up the next day at the

East Side agency and the Volkswagen turned in. Mr. Williams instructed his bank to mail the title to the Volkswagen to Mr. Kerr. He testified that in talking with Mr. Kerr: (R. 291)

> "He told me that there was an error in the preparation of the title or the transfer and that it was necessary that they apply to the Studebaker Corporation to get a good title which would take approximately a week or so, then I would have it."

The bank called Mr. Kerr and was assured that he would have the title delivered to Mr. Williams within three days. Not receiving the title, Mr. Williams went to see Mr. Kerr and was told that everything was being taken care of, that Mr. Williams would receive his title, that the particulars were confusing, and he should contact Kerr's attorney, Mr. Nusan. Mr. Williams ultimately received a memorandum copy of the title to the new car showing a lien of $2,255.26 in favor of the Union Acceptance Corporation.

In January 1962 Louis Kerr employed one *Richard Kissroczi* as a salesman for L. S. Kerr Motors. In July 1963 Kissroczi's duties included running titles, that is, taking titles to the Title Bureau for transfer. He did this at the direction of Louis Kerr. He first saw State's Exhibit 42, a title to a 1962 Volkswagen when he picked it up at the Central National Bank and took it to Kerr Motors, where it was filled out by Dollie Reed to transfer the title to L. S. Kerr Motors. There was no signature on the assignment, and when Richard Kissroczi called this to Mr. Kerr's attention, Kerr told him, "Well, go ahead and take care of it." Richard saw a pink power of attorney in the envelope containing the papers on the Williams purchase. The power of attorney was not filled in and was not acknowledged before a notary. After the certificate of title

to the Volkswagen had been transferred to Kerr Motors, Richard took it to Akron and gave it to Mr. Brewster and received another envelope from Brewster.

Richard testified he had not seen State's Exhibit 37, a memorandum certificate of title application bearing the signature of Herman Adelstein. He said the signature was not his writing. At this point the prosecutor stated he had been taken by surprise and asked permission of the court to cross-examine the witness. On cross-examination Richard was questioned as to statements he had made to Mr. Hill and Miss Abrams of the Bureau of Motor Vehicles.

Concerning a certificate of title in the name of Herman Adelstein, which Richard obtained from the Cleveland Automobile Club on July 11, 1963, Richard testified: (R. 338-339)

> "First thing I did was Mr. Kerr call me in the office and told me to go pick up his title, have it transferred into Kerr Motors name. So I went to the business office, checked Dr. Adelstein's jacket. There was no power of attorney there and I went back to Mr. Kerr and I told him there was no power of attorney and Mr. Kerr stated that it was all right, Dr. Adelstein had given us power to sign Dr. Adelstein's name. So I went down to the Auto Club and picked the title up. I went to the Bureau and had it transferred into Kerr Motors name.
>
> * * *
>
> Q. Will you tell us what did you do with respect to the power of attorney?
>
> A. Well, after that when Mr. Kerr stated I could sign Dr. Adelstein I went to the office, got a power of attorney and I signed Dr. Adelstein.
>
> Q. You signed Dr. Adelstein's name to the power of attorney?
>
> A. I did.
>
> Q. After you signed that power of attorney will you tell us what you did?

A. Took to the title bureau and had it transferred in Kerr Motors name."

After having the signature notarized he took the envelope to Akron and delivered it to Mr. Brewster and in turn received another envelope. Dr. Adelstein never gave Richard Kissroczi authority to sign Dr. Adelstein's name.

Mr. James Bartels, the president of the Union Acceptance Corporation, testified to his floor plan arrangement with Mr. Kerr: (R. 382)

"Well, I would pay for the cars at the factory and I would hold the statement of origin of the car. The car would be delivered to L. S. Kerr Motors and when the car was sold I would have been paid off for the car and get my money back.

Q. What would you do with the statement of origin?

A. I would hold the statement of origin.

Q. After that was paid what would you do?

A. I would release it to the selling dealer.

Q. The dealer would be L. S. Kerr?

A. That is right."

Mr. Bartels was asked: (R. 390)

"Q. Show you State's Exhibits 34, 10, 33 and 36, will you tell us what is still owed on these vehicles?

A. Title in name of Jay E. Williams, $2,255.26 owed; certificate of title made out to Charles Sefcovic $1,899.59 is owed; certificate of title made out to Roy L. Bolton, $3,124.41 is owed; certificate of title made out to Herman Adelstein $3,110.89 is owed.

Q. And the reason for the lien described thereon and the reason for giving titles is what? What is the reason?

A. For my security.

Q. Why did you give these people titles?

A. I put titles in their names with liens noted on them because these people could not secure license plates to drive the cars.

Q. License plates for what year?
A. 1964."

Evan B. Brewster agreed to floor plan cars for Louis Kerr in the summer of 1961, on a personal basis, that is, personal guarantees by Mr. Kerr, who had told him he owned and controlled the business of Kerr Motor Sales, Mrs. Louis Kerr, and the other two stockholders, Hilda and Gail Zdolsek. Mr. Brewster described the floor plan arrangement as follows: (R. 440-441)

"Q. In conducting a business with Kerr Motors, would you tell us exactly what your function was with respect to the factory and what Mr. Kerr's function was with respect to the factory?

A. I started as the floor-plan financer on an agreed upon line for both used and new cars. Mr. Kerr would send me his purchase orders of copies of his purchase orders and I would pay for drafts against these orders for which title was sent to me. I could then lien the title, record is in Cuyahoga County, bill the company and hold the title on the floor-plan account.

Q. Now, you said a car would be ordered, say a new car. What would be sent to you?

A. Mr. Kerr would send me duplicate copies of the essential information concerning the car on forms we prepared and he would send, at the same time, a check for the equity on that car. Many cars were six per cent of the F. O. B. price plus a freight allowance, as I recall.

Q. What would the Studebaker Company send you?

A. The Studebaker Company would ship the car directly to Kerr and would send a draft through my bank with the invoice and manufacturer's certificate on that car in a draft envelope. When I paid the draft to the bank, then I received the company's invoice and certificate of origin."

In July 1963 Mr. Brewster received a certificate of origin on a 1963 Hawk, serial No. 63 V 34587 (St. Ex. 47). It was added to the floor plan for $2,290. The lien was paid off by Kerr and the certificate sent to him. The same evening Louis Kerr told Mr. Brewster the deal had been revoked and he was sending the certificate back to refloor for $1,400. Mr. Brewster advanced $1,400 on that invoice. Later on, Kerr told him that they had sold and delivered this car out of trust to a Miss Oppenheim, and it developed that a second certificate of origin for the same car had been sent by Studebaker Corporation to Kerr Motors.

Mr. Brewster testified to the details of all the transactions in which cars on which he had liens were sold by Kerr Motors without the liens having been paid off. He never received payment for any of them except a $100 settlement he made with Miss Vogel. He was cross-examined extensively by defense counsel (R. 472-595) as to his dealings with Kerr Motors.

Mr. Robert L. Corns of the special records department of The Cleveland Trust Company, testified to a series of checks drawn on the Cleveland Trust Company accounts of L. S. Kerr Motors and signed by Louis Kerr. When these checks were presented for payment they were all returned, either for insufficient funds or that the account was closed.

On August 26, 1963 the L. S. Kerr Motors issued a check signed by L. S. Kerr for $362 to the Acme Radiator Company in payment of an invoice for that amount. The check was deposited in the name of the Acme Radiator Company's bank account. The company received a notice from the Cleveland Trust Company that Kerr Motors had closed their account on August 26, 1963. The check was never made good.

A check for $100 dated August 27, 1963, issued by L. S. Kerr Motors, Inc., signed by L. S. Kerr, endorsed by Dick Kissroczi, was cashed by Kissroczi at a tavern owned by Alex Gaye. Gaye gave Kissroczi $100 in cash and later deposited the check in his account. The check was returned from the Cleveland Trust Company with a notice that the account was closed.

State's Exhibit 49 is a check payable to Julio Sanpetrino, issued by L. S. Kerr Motors Company, signed by L. S. Kerr, President, drawn on the Cleveland Trust Mayfield-Lee Office. The check bears the endorsement by Julio Sanpetrino, and an okay by a store manager of Heinen's, Incorporated. The check was returned by the bank with a notice that the account had been closed. The store manager paid the Company. Another check, in the amount of $69.80, signed by L. S. Kerr, President, payable to George Foltz was returned to Heinen's because the account had been closed.

Francis W. Biehl, the general credit manager at the May Company, identified a series of checks cashed at the May Company and returned unpaid, as follows:

State's Exhibit 50: drawn by L. S. Kerr, Motors, Inc. signed L. S. Kerr, payable to Barbara Kerr for $150; returned by the Cleveland Trust Company because account was in litigation.

State's Exhibit 51: drawn by L. S. Kerr Motors, Inc., signed by L. S. Kerr, President, payable to George Foltz, for $120.25, endorsed by George Foltz; returned by Cleveland Trust Company not paid.

State's Exhibit 52: drawn by L. S. Kerr Motors, Inc., signed by L. S. Kerr, President, payable to George Foltz for $88.97, endorsed by George Foltz; returned by Cleveland Trust Company, account closed.

State's Exhibit 53: Check drawn by L. S. Kerr Motors, Inc. by L. S. Kerr, President, dated August 22, 1963, payable to Don Warner, for $291, endorsed by Don Warner; returned from Cleveland Trust Company unpaid, account in litigation.

State's Exhibit 54: drawn by L. S. Kerr, Inc., by President L. S. Kerr, payable to L. S. Kerr, for $200, endorsed by L. S. Kerr, second endorsement by Barbara Kerr; returned by Cleveland Trust Company unpaid, account closed.

State's Exhibit 55: drawn by L. S. Kerr Motors, Inc., signed by L. S. Kerr, President, dated August 22, 1963, for $241, payable to Don Warner, endorsed by Don Warner; returned by Cleveland Trust unpaid, account in litigation.

DEFENSE EVIDENCE.

The major portion of the testimony in the bill of exceptions was presented by the defense and was directed to establishing, first, that Louis S. Kerr should not be held personally responsible for transactions done in the name of the corporation; second, that any and all of the fraudulent acts for which Kerr was being tried came about as the result of the heavy financial burden imposed by the floor-planners, notably Mr. Brewster, which resulted in his being forced into bankruptcy.

The defendant took the witness stand. His testimony on direct examination covers three hundred pages of the record. He gave a long and detailed recital of his operations of the automobile agency, commencing with his purchase, with money furnished by the Zdolsek sisters, for $61,000 of the stock of O'Malley Porach, Inc. which had operated a Chrysler agency at the Mayfield Road address. Kerr claimed he negotiated this deal in 1961 without ever finding out whether the Chrysler Corporation would grant

him a franchise to sell Chrysler cars and without ascertaining the financial worth of the corporation whose stock he was purchasing. Eventually, after a period of months during which he kept the business operating on capital advanced by the Zdolseks, a floor planning arrangement was made with Mr. Brewster and a Studebaker franchise obtained.

The defendant admitted that all the fraudulent sales charged in the indictment had been made, that all the checks had been written and cashed when there was no money in the bank to cover them, because cash was needed in the operation of the business, but claimed that he was innocent of any wrongful intention. He attributed all financial difficulties to exorbitant financing requirements imposed by Mr. Brewster and to his own altruistic desire to keep the business going for the benefit of the employees.

ARGUMENT.

The petition herein is devoted chiefly to arguing the denial of a fair trial under the Fourteenth Amendment by reason of alleged erroneous rulings of the trial court in the course of the trial. These claims of error, involving for the most part the admission of evidence and Ohio trial procedure, furnish no ground for this Court's intervention. The due process clause of the Fourteenth Amendment does not permit a party to bring to the test of a decision in this Court every ruling made in the course of a trial in the state court.

Moreover, there is no merit to the claim that the petitioner did not have a fair trial, either by reason of the court's decisions claimed to be erroneous or by reason of the alleged denial of the right of confrontation, as the following discussion of the subjects presented in his petition shows:

> I. The petition alleges: The refusal of the trial judge to give additional instructions upon matters of law when requested to do so by the jury constitutes prejudicial error by depriving the accused of a fair and impartial trial.

Actually defense counsel did not want any further charge going to the jury and the State did not press the matter. Therefore, the court refused to charge the jury any further, but told them to recall the court's charge in its totality. There was no objection on the part of the defendant to the court's action.

The Ohio rule is that intent is a question of fact for the jury, 52 OHIO JUR. 2d 596, Sec. 101; *C. & St. L. R. Co. v. Krouse*, 30 Ohio State 22. Fraud and the existence thereof and any of its elements, whether alleged fraudulent misrepresentation were in fact made and relied

upon, and whether a statement was made as a statement of fact or of opinion, are generally considered questions of fact for the jury, 52 OHIO JUR. 2d 597, Sec. 102. Hence whether or not Louis Kerr issued checks involved with intent to defraud was a question of fact for the jury after examining the totality of the surrounding circumstances. Therefore, the court could properly comply with counsel's request not to re-charge the jury on intent to defraud, without violating Ohio Revised Code Section 2315.06.

> II. The petition alleges: The failure of the trial court to instruct the jury to limit the application of evidence of other alleged criminal conduct of the accused to the purpose of showing the scheme or plan of the accused attending his action with respect to the crime for which he is being charged constitutes reversible error and a denial of a fair and impartial trial.

The substance of this claim is that a quantity of evidence was admitted which tends to show other offenses committed by the defendant, thereby requiring an instruction by the court limiting the purpose of such testimony to that permitted by the provisions of Revised Code 2945.59. The petition contains some quotations from the record, and record references to other testimony including some testimony elicited by defense counsel.

For the most part the quoted testimony was developed in the course of questioning a particular witness and was relevant to the disclosure of Kerr's method of operation as establishing guilty knowledge and intent to defraud. The record shows few, in any, objections by defense counsel to the testimony of these dealings; in fact, the same or similar testimony was brought out in direct testimony of the petitioner himself. Some of the testi-

mony complained of was from employees and business associates of the corporation: Richard Kissroczi, James Bartels, Bernard Kiel, George Foltz, Francis Biehl, Attorney Morris Blane, Attorney Anthony Nosan, all of whom were testifying as to the operation of Kerr Motors, Inc. and not as to similar acts. The defense presented testimony by attorneys for the corporation, Morris Blane and Anthony Nosan. They testified fully with respect to the operations of the corporation and the pending bankruptcy proceedings. There is no basis for this claim of error.

Incidentally, the State is of the mind that the court wrongly withdrew the testimony of petitioner's past conviction of a State statute. The defendant had admitted such conviction (R. 2120-2121).

> III. The petition alleged: A denial of the right of the accused to confront the witnesses is violative of Article I, Section 10 of the Ohio Constitution and the Sixth and Fourteenth Amendments to the United States Constitution and such denial constitutes prejudicial error and a denial of due process of law.

Actually the petitioner was not denied any constitutional right of confrontation by reason of the fact that the State did not present the testimony of one Dr. Adelstein and the husband of Susan Cass. The record shows that Susan Cass testified that she and her husband went to L. S. Kerr Motors, Inc. That the car in fact that she bought was hers, but that they put it in her husband's name; that it was her money that paid for the auto. The money for the auto actually came from Mrs. Cass's father.

Nor was any testimony by Dr. Herman Adelstein needed when Mr. Richard Kissroczi testified that he signed the doctor's name to the power of attorney. There simply is no factual basis for petitioner's objections.

IV. The petition alleges: The consolidation of two indictments totaling five separate different offenses, twenty-five counts and forty-four different verdicts denies the accused the right to a fair and impartial trial and is a denial of due process of law as guaranteed under the Ohio and United States Constitutions, and the failure of the trial court to secure a stipulation of record showing defense's acquiescence in such consolidation is prejudicial error. The consolidation of two indictments, totaling five separate different offenses, twenty-five counts, and forty-four different verdicts, created a circumstance which resulted in systematically excluding petitioner from having the effective assistance of counsel and violated the concept of fundamental fairness and prevented defendant from having a fair and impartial trial.

The petitioner states that this is the most precipitous error of this trial. The records shows the following: (R. 5)

"Mr. Smith: I would like to make a motion that the indictments be consolidated in this case. We have two cases here, your Honor.

The Court: Is this by stipulation?

Mr. Smith: Yes, by stipulation.

The Court: The motion is granted. Stipulated by both parties that the indictments be consolidated.

Mr. Smith: All right.

The Court: Anything further, gentlemen?

Mr. Benjamin: Have you got those case numbers here?

Mr. Smith: I have the case numbers. Case No. 79072 and Case No. 79231 be consolidated."

The record permits no conclusion other than that the indictments were consolidated by stipulation. Defense

counsel was present and had it been otherwise he most certainly would have spoken.

Furthermore, the consolidation was proper in the circumstances of this case where all of the offenses were connected in their commission in that they all occurred within a relatively short period of time and arose out of Kerr's financial manipulations in the operation of the automobile sales agency. The statute, Ohio Revised Code Section 2941.04, is in the alternative; the indictment may charge (1) different offenses connected in their commission; *or* (2) different statements of the same offense, *or* (3) two or more offenses of the same class of crimes. Revised Code Section 2941.28 allows the court to sever counts if it is the opinion that Revised Code Section 2941.04 has been violated, but the court in this case felt that all of the crimes were connected to L. S. Kerr, Inc. in their commission, and all parties to this trial agreed that the indictments be consolidated.

The allegation that the consolidation resulted in petitioner's being denied the effective assistance of counsel is utterly without merit. Throughout the trial this petitioner had two experienced trial counsel well able to try his case and protect his rights.

Although petitioner alleges that the consolidation forced one of defense counsel to take the stand and be subjected to cross-examination, he does not specify in what respect such cross-examination was prejudicial. Actually the defense placed one Mr. Nosan, the corporation's attorney, on the stand. He had determined after an examination of the books that the corporation was in financial difficulty, this being the picture that the defense was painting. When he testified with respect to his duties, obligations, and advice to the corporation, cross-examination on such matters was proper. There was no

objection by either the State or the defense to any of his testimony. The confusion which present counsel for the petitioner attributes to trial on the consolidated indictments simply did not exist.

V. The petition alleges: The arbitrary excusing of a juror during the progress of a criminal trial without an explanation of record or consent of the parties and counsel, constitutes reversible error and a denial of a fair and impartial trial.

The applicable statute providing for the discharge of a juror before the conclusion of the trial and replacement with an alternate is Section 2945.29 of the Revised Code of Ohio, not Section 2945.36 referred to by petitioner. Section 2945.29 does not provide that the reason for such discharge shall be entered on the journal. Moreover, no objection was made when the juror in question was replaced with the alternate, and it is only fair to assume that defense counsel agreed that the alternate should be seated.

VI. The petition alleges: Alleged conversations with the accused were indiscriminately admitted into evidence without prior evidence tending to establish the corpus delicti—in derogation with the law of the State of Ohio—thus denying petitioner his right to a fair and impartial trial.

The rule of law laid down in *State v. Miranda*, 94 Ohio St. 364, that there must be some evidence outside of a confession tending to establish the corpus delicti before such confession is admissible, is not involved in this case where no confession by Kerr of his guilt of the offenses was offered by the State. Petitioner seems to be objecting chiefly to testimony by State's witnesses of their conversations with Kerr in the course of their dealings with him

pertaining to the failure to deliver certificates of title and to Mr. Brewster's testimony of his conversataions with Mr. Kerr.

Mr. Brewster, Mr. Richard Kissroczi and Mr. George Foltz were employees and business associates of L. S. Kerr Motors, Inc. Where and from whom they received their orders was part of the state's case because of the corporate identity of L. S. Kerr Motors, Inc. *State v. Steman*, 90 Ohio App. 309.

Mrs. Marcia Nease (R. 93 to the end of her testimony), Mrs. Anna Vogel (R. 169 to the end of her testimony), Mr. Roy Bolton (R. 227 to the end of his testimony), Mr. Jay Williams (R. 283 to the end of his testimony) all testified as to buying cars and not receiving titles. There was nothing in their testimony relating to a confession by Louis S. Kerr. Some of these persons dealt directly with Louis S. Kerr. In the purchase of their automobiles and the conversations complained of dealt with the terms of their purchase and the failure to get their titles.

Furthermore, the record does not show any objection by defense counsel to admission of these conversations. In fact, counsel for Mr. Kerr frequently cross-examined these witnesses as to what had been said to them, either by the Kerr employees or by Kerr himself. And the defendant himself on direct examination testified again and again to his conversations with Mr. Brewster and others.

VII. The petition alleges: Permitting the State to amend counts of an indictment after both the State and defense have rested constitutes an abuse of discretion and a denial of due process of law.

Although petitioner recognizes that Section 2941.30, Ohio Revised Code, permits an amendment of the indict-

ment after both sides have rested, he claims that the amendment in this case denied him the right to cross-examination. However, the petition does not set forth any specific way in which the amendment resulted in his not being able to cross-examine any witness.

> VIII. The petition alleges: The State is not permitted to cross-examine its own witnesses in the absence of laying a foundation therefor, and the raising of prejudicial inferences by the State in cross-examining its own witnesses without substantiating such prejudicial inferences by direct testimony is violative of a far and impartial trial.

The substance of this complaint is that the court improperly permitted cross-examination of Richard Kissroczi, as a hostile witness. To cloud the issue, defendant appends the excerpts from the record at pages 332-338 that he states deal with the matter, but a check of the record would reveal that the witness Richard Kissroczi's testimony starts at page 314 of the record. It is obvious from his testimony that this witness was forgetting important signing incidents in an effort to aid Louis Kerr. The State was rightfully allowed to refresh the witness's memory. The State read parts of the witness's statement in an effort to get him to speak the truth which he voluntarily did after his memory was refreshed (R. 338 to 341). Ohio law permits this procedure. 56 OHIO JUR. 2d 733, Sec. 305; *State v. Duffy,* 134 Ohio St. 16.

IX. The petition alleges: Petitioner was denied a fair and impartial trial and due process of law by the trial court's permitting the prosecutor to engage in a course of conduct and questions that were irrelevant, illegal and prejudicial to the petitioner's rights.

It is noteworthy that petitioner's counsel does not allege that trial counsel made any objection to the prosecutor's questions. Furthermore, the subject matter of this claim of error involves such an elementary proposition as not to require answer, i.e., the great latitude and discretion accorded the trial judge in determining the limits of cross-examination and examination of witnesses.

X. The petition alleges: The procedure employed by the prosecutor of refreshing the witnesses' recollection was, on a number of occasions, a clear violation of criminal procedural requirements without any just cause and constituted a deprivation of petitioner's right to a fair and impartial trial and due process of law.

The petitioner apparently has reference to the witness, Evan B. Brewster, whose recollection was refreshed from documents in his file. Again it is not alleged that trial counsel made any objection, and again the subject matter comes within the latitude and discretion given the trial judge to determine the limits of examination of witnesses.

XII. The petition alleges: The comments and final argument of the prosecuting attorney appealed to the prejudice of the jury and thus denied petitioner a fair and impartial trial.

Other than mentioning that the prosecutor called the petitioner a "con man" the petition herein contains no

examples of the alleged inflammatory and prejudicial remarks of the prosecutor. Defense counsel did not object to the designation of petitioner as a "con man"; moreover the evidence warranted the prosecutor's use of that term. Actually, the prosecutor confined his argument in great part to the facts of the case, and at points his argument was obviously in response to and provoked by defense counsel's argument, wherein a State's witness was referred to as "charmer" (R. 2337); "the internal revenue" (R. 2338); "fleecer" (R. 2354); "a man who through his sheer talent, took from others for his own personal gain" (R. 2354); "evil genius" (R. 2382); "weasel" (R. 2384); "I don't think that Mr. Brewster was pure as the driven snow he alleges" (R. 2387); "prosecution or persecution" (R. 2393); and "I will tell you who the super salesman was, the con artist—not this poor fellow here—Mr. Brewster. He was a master."

At no point was the prosecutor's argument not based on the evidence and the reasonable inferences to be drawn therefrom. At no point was it threatening, or an appeal to convict to meet a public demand, or so prejudicial as to require the trial court's intervention or to amount to a denial of due process.

XIII. The petition alleges: The denial of the trial court of petitioner's motion for a directed verdict, made on the ground that the prosecution had failed to prove venue as to each count, was prejudicial error and a denial of a fair and impartial trial.

The claim of failure of proof to establish venue on four counts is without support in the record. Venue was established as to the counts charging failure to deliver certificates of title to Sam Dituri (R. 139), Andrew Ryba (R. 158), and Rheta Fugueroa (R. 216). As to the check

to Acme Auto Radiator Company, venue was established many times in the record, one such instance being at page 608, where the testimony is that the check was sent to the Euclid-79th Branch of the Cleveland Trust Company, in Cleveland, and more specifically at page 628.

> XIV. The petition alleges: In the trial of a criminal case an accused is entitled to a charge of law that is relevant to all issues of fact, and an omission of law governing the issues or the incorrect stating of the law that results in prejudice to the accused denies that accused his right to a fair and impartial trial.

The defense did not request any special instructions with respect to any of the subjects now complained of, nor did they submit any instruction to the court. In fact, defense counsel stated that they were satisfied with the court's charge. *Rucker v. State,* 119 Ohio St. 189; *Miller v. State,* 125 Ohio St. 415; *Jones v. State,* 20 Ohio St. 34.

It was unquestioned in the testimony that Louis Kerr was the president of the corporation, Kerr Motors, Inc., and the instruction as to corporate officers was therefore proper. The counts for larcency by trick, Section 2907.21, Ohio Revised Code, were properly charged in the indictment, *State v. Healy,* 156 Ohio St. 229, reversing *State v. Healy,* 58 Abs. 33, 95 N.E.2d 244, and the court's charge on this statute was likewise proper.

CONCLUSION.

The record of this trial affirmatively establishes that no fundamental concept of liberty and justice inherent in the concept of due process of law was offended, and that the petitioner had an eminently fair trial.

There was nothing unfair about the consolidation of the indictments for trial. Not only was this done with the

consent of defense counsel but all of the counts arose out of the operation of the Kerr Motors, Inc. agency within a relatively short period of time and were connected in their commission because of the financial condition of the corporation.

The petitioner testified for three days, admitting he did the acts with which he was charged but attributing his conduct to the financial troubles of the business. His testimony and the argument of his counsel amply refutes his claim of confusion resulting from consolidation.

The petitioner has not shown any deprivation of constitutional rights entitling him to review by the Court. The writ should be denied.

Respectfully submitted,

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APPENDIX.

OHIO REVISED CODE, SECTION 2945.29.

2945.29 (13443-13). Jurors becoming unable to perform duties.

If, before the conclusion of the trial, a juror becomes sick, or for other reason is unable to perform his duty, the court may order him to be discharged. In that case, if alternate jurors have been selected, one of them shall be designated to take the place of the juror so discharged. If, after all alternate jurors have been made regular jurors, a juror becomes too incapacitated to perform his duty, and has been discharged by the court, a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or thereafter impaneled.